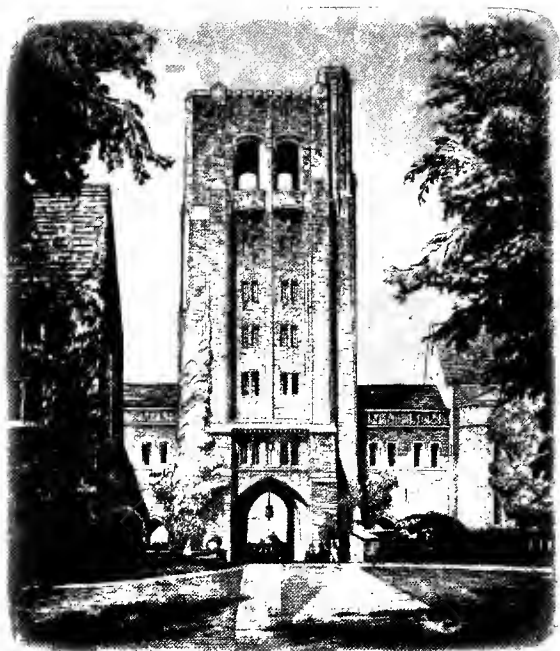


# SPIRIT OF THE COURTS

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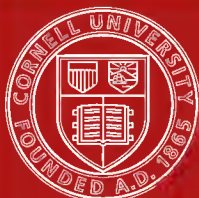
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# SPIRIT OF THE COURTS

BY

THOMAS W. <sup>ALL</sup>SHELTON

*Chairman, Committee on Uniform Judicial Procedure  
American Bar Association*

*"Justice is the greatest interest of man on earth. It is the ligature which holds civilized beings and civilized nations together."*—DANIEL WEBSTER.



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*"I do know that the United States, in its judicial procedure, is many decades behind every civilized government in the world; and I say that it is an immediate and an imperative call upon us to rectify that, because the speediness of justice, the inexpensiveness of justice, the ready access of justice, is the greater part of justice itself."*

WOODROW WILSON.



## P R E F A C E .

Much time and treasure are being expended in the laudable effort to prepare for the safety of the nation from actual and *intentional* foes from without. There are many other thousands of patriotic citizens engaged in the effort to save the nation from actual but *unintentional* foes from within. The former are trying to build up the national defense. The latter are trying to assure a reasonable certainty of justice. It is the purpose of these pages to emphasize that the failure of the latter will render useless the work of the former, for there will be no government to protect. If one may so describe it, the former are giving attention to the garments needed in protecting the body of the great nation, while the latter are watching over the heart that it may regularly send out the life-blood of faith and contentment in the form of a prompt, economical and scientific administration of the law, for of the three departments of government the judicial actually measures its usefulness and endurance. Manifestly it is necessary and expedient that both objects shall be concurrently achieved. The obvious necessity for an adequate public defense appealed even to the thoughtless, and the propaganda thereby

quickly arose to the dignity of a live national issue. It is not so with the courts. The layman's ignorance of the processes of jurisprudence and its instrumentalities, aggravated by a lack of interest of a great many learned as well as thoughtless lawyers, has prevented a popular appreciation that well-nigh effaced it from public notice, except by way of ill-directed criticisms. There was no concerted effort at advancement. There exists no practical, scientific supervision of the trial courts.

Under the inspiration of these sentiments and hoping to assist in further awaking a quickened professional and lay conscience and in directing a wholesome public sentiment, a number of addresses were made in different States through a period of six years. With a full consciousness of a paucity of merit, but encouraged by an earnest desire to aid in bringing the general public into a better understanding of its relation to the courts and of the courts to the government, I have acceded to the requests of friends of simplified and uniform judicial procedure, and these addresses, with a few appropriate changes and rearrangement and some additions, have been published in book form. To the charge of discursiveness and the liberal use of popular instead of scientific language, there will be a confession and avoidance. Our goal is sim-

plicity. Mystery, technicality and subtlety are, therefore, unsuitable elements. The aim is to put men and women to thinking about improving instead of criticising the courts. When they begin to think they will begin to seek what is not to be found within these covers, nor in any other one book—the means for a gradual, scientific perfection of judicial and juridical conditions, based upon the fundamental principles adopted by the American Bar Association, the pivotal thought of which is that *Congress shall set the Supreme Court free*.

The thoughts are ventured that a recrudescence of the old-time faith in and love and veneration for the courts and an intelligent, practical progress in the detail machinery so as to fit the changing hour, are necessary to the perpetuation of the great North American Republic, the scheme of government of which has no equal in history. The belief is expressed that this nation has set its face to the rising sun of a new juridical era; that we are moving on with the resistless tide of a wholesome public sentiment that will know no halting until the bench and bar shall have fulfilled their high ideals.

Acknowledgment is made of the admirable assistance and co-operation rendered by Mr. J. Frederick Essary, of Washington, D. C.,

who, upon receipt of the completed manuscript, directed all details. The author acknowledges, but will not endeavor to give expression to his gratitude, the sympathy and encouragement of Mr. Taft and Dean Roscoe Pound, which are always within reach of the humblest effort made in the interest of a reasonable certainty of justice.

THOMAS W. SHELTON,  
Norfolk, Va.,  
July, 1918.



## INTRODUCTION.

By ROSCOE POUND.

A generation ago the proceedings of our bar associations, state and national, were filled with encomia on the common law and invectives against futile legislative attempts to interfere with the inevitable course of legal history. Whether lawyers held to a philosophical view of law as declaratory of principles to be deduced from the nature of the abstract human being or preferred a historical view, taking law to be a formulation of human experience in the administration of justice in which the idea of right or the idea of liberty was progressively realizing, they were agreed in denying that in any real sense it could be made consciously and hence in disclaiming any power to improve it consciously. Hence when the popular demand that the legal system more adequately secure interests which are held vital in the society of today first became acute, lawyers met it with confident eulogy of the traditional law as equal to all conceivable emergencies and with elaborate philosophical theories of *non possumus*. Later this attitude visibly changed to one of deprecating defense. The exaggerations of the legal

muckraker of the first decade of the present century were justly decried, but consciousness of a substratum of justification for popular dissatisfaction hampered the lawyer's defense. More recently the lawyer has become receptive to criticism. He has learned to distinguish the outpourings of smatterers and quacks, which are but a symptom, from the well founded murmurings of a public which pays for justice and does not always obtain it. On the whole, if we compare the proceedings of bar associations today with those of the end of the last century the change of attitude is significant. Everywhere there have come to be lawyers who are willing to stand for active efforts toward improvement.

Coincident with this change in the attitude of the bar a change has taken place in the mode of thought of writers and teachers. A generation ago the deductive method held the field. The jurist began with a handful of fixed conceptions, arrived at, according to his theoretical starting-point, by analysis of the existing law, by generalisation from the history of our legal system and of legal doctrines and institutions, or by metaphysical speculation, and relied upon a rigid logical development of those conceptions for the solution of every problem in the administration of justice. The law of real property, a logical unfolding

of ideas drawn from the feudal land law, is now almost alone in preserving the spirit of the law studied and taught and administered by our fathers. To that generation, the law stood upon its own basis. It was self-sufficient. Whether the jurist drew his fundamentals from the existing law of today by analysis or from the course of historical development of the traditional law by generalisation or conceived of an inexorable operation of social laws whose necessary workings could bring about the legal dogmas and legal institutions that exist, he was assured of the futility of conscious attempts at improvement and was clear that his task was merely one of observation. Today this juristic pessimism has been definitely given up. We look at the law functionally. We ask not so much what it is abstractly as what it does, what it may do and what it ought to do. The skeptical attitude of the past generation has definitely yielded to faith in the efficacy of effort. Obstructive pessimism has given way to constructive optimism.

This does not mean that the lawyer of today expects to achieve a legal revolution over night through some patent automatically acting statute. It means rather that what to the lawyer of 1890 seemed impossible, today is thought of rather as difficult. Instead of holding that law cannot be made consciously but

may only develop in a gradual process of orderly evolution, we hold that it may be made and may be made effectively, but we recognize the intrinsic limitations upon effective securing of interests through legal machinery and do not hope, as did the eighteenth century, to spin a complete legal system of universal validity from the head of a single jurist. Faith in blundering empiricism and in the inexorable operation of social forces beyond human control has been replaced by faith in conscious and intelligent direction of legal development to the accomplishment of chosen ends. The proceedings of the annual Conference of Bar Association Delegates in connection with the meetings of the American Bar Association are eloquent of a sounder frame of mind on the part of those who are best qualified to make American law an effective instrument for its purpose.

In any practical program for the improvement of judicial administration of justice in the United States, there must be four cardinal items. First and in many ways most important is the personnel of the bench, the mode of choice and tenure of judges. Because of the connection of the bench with enforcement of the criminal law, and the judicial power with respect to unconstitutional legislation, we have been too much engrossed with the political

aspect of the judicial office. In consequence more than one of our commonwealths has realized the truth of Bacon's saying: "An ignorant man cannot, a coward dares not, be a good judge." The everyday adjustment of relations of individuals with each other and with the state is less in the public eye than the occasional matters of spectacular interest that come before tribunals under our Anglo-American doctrine of the supremacy of law. But accurate and speedy adjustment of these relations is at the bottom of the social order. We must keep in mind the requirements of everyday administration of justice, and foremost among these is the strong independent judge. Second we may put organization of courts, the unification of the judicial system, in such wise as to permit the entire judicial force of the commonwealth to be employed in the most effective manner possible upon the whole judicial business of the commonwealth, making adequate provision for speedy and expert disposition of petty causes, for organization of the clerical and administrative side of the courts, and for adequate and responsible supervision of every phase of judicial business. Third we may put, what is often put first, but must depend for its effectiveness largely upon the two preceding items—simplification of procedure and relegation of procedural

machinery to its legitimate place in the administration of justice. Last, but by no means least in importance, is organization and training of the bar.

To some extent the American Bar Association has busied itself for many years with each of these items in a comprehensive plan of law reform. State bar associations too are more and more taking them up. More recently the American Judicature Society has been at work upon them. But in the end our main reliance must be upon critical study of the local aspects of these several problems by lawyers who have first taken the trouble to acquaint themselves with the general principles involved, to learn how far the problems are general and how far local and to acquire accurate information as to the experience of the rest of the world in dealing with them.

For many years Mr. Shelton has been conspicuous among those who have essayed an intelligent program of general scope as distinct from the conventional one of haphazard tinkering with local details. By addresses before state bar associations and through the committee on uniform judicial procedure of the American Bar Association he has striven to make of the proposition that the lawyer is not an ordinary bread winner but rather a public functionary charged with high public duties

something more than a high-sounding phrase to round out a period after a bar dinner. His experience as a lawyer, his association with the profession throughout the country and his activities in connection with concrete law reforms have qualified him to speak upon many things as to which, thus far, the politician, the labor agitator, the social worker and the teacher of politics have had a monopoly of the printed page. I should be the last to undervalue what these lay critics have done in awakening the lawyer from his dogmatic slumber and making him conscious of the demands made upon law by a new century. But the very complexity of the problems raised by these demands calls for all the light that may be shed upon them from any quarter. Not the least among these sources of enlightenment must be the legal profession itself.

Harvard University, July, 1918.





## A STATEMENT.

A Rip Van Winkle, awakened during the second decade of the twentieth century, would be amazed by the magnificent railroads that have taken the place of the road cart, by the swift steamships that now tower above the little sailing schooner, by the splendid glow of electric lights that have made useless the humble tallow candle, by the scientifically equipped hospitals and commodious and sanitary school buildings, and last but not least, by the imposing courthouses whose Corinthian columns and ornate interiors impress even a modern-day observer. He would see the forward strides of seven-league boots in education, civilization, commerce, transportation, science and art, but he would observe the progress of the snail in judicature. Bewildered at all things else and standing awestruck before the portals of the temples of justice, at the bar, he would feel at home. The text-book on pleading and procedure that rotted by his side a half century ago would serve him today. He need only become familiar with certain "statutory amendments," the crutches upon which decrepitude has hobbled these fifty years or more. In the library the reported cases would shock him as to volume,

often amaze him as to doctrine, and always discourage him as to conflict.

While the commercial and social advancement of this great nation, proceeding under a well-organized co-ordination, has become the wonder and envy of the world, its court procedure has lagged behind, a patched-up creature of another age that incongruously parades with this generation. When it has not taken the form of the ghost of an abandoned past, clothed in metaphysical subtleties, it has been enveloped in a mesh of legislative experiments and innovations, the latter state of affairs being worse than the former. One of the most disastrous results is, that the trial lawyer is becoming not so much a profound student of the law, its science and its purpose, as he is developing into a nimble-witted, special pleader, equipped with an alarming supply of procedural technicalities. This is spoken not in criticism, but as a statement of one of the obvious results of existing conditions.

In a demoralizing number of cases the issue is never reached or has to be retried because of the failure to scrupulously observe technicalities of pleading and procedure. The average brief lays emphasis, not so much upon the actual wrong of the judgment, of which complaint is made, as upon the fact that it

was not obtained exactly in the manner provided piecemeal by a hurried and harassed legislature. Justice, to that extent, has been subordinated to technicality and profundity has had to give place to subtlety. Such a condition is subversive of good government, for it destroys the necessary faith in courts and lawyers alike. Laymen have ever taken pride in their great and profound lawyers and judges, but they have no place in their hearts for the mountebank. It is a profound philosophy that man is to a great extent a creature of circumstance; therefore, a lawyer's development will respond to the character of the demands made upon him and the conditions surrounding him. He is engaged to win, and he can use only the tools provided for him and in the manner described, or give up the profession of the law.

But "our bravest lessons are not learned through success, but misadventure." The unbridled criticisms of the courts and of the lawyers that have become so fashionable, the suicidal theory of the recall, and the threat of further impractical statutory procedure have served a useful purpose. A crisis has been precipitated that has prepared the way for a rich harvest of unselfish public spirit, the result of seed that have been diligently sown during the last half decade. It is no longer

a debatable question that there is something wrong with the judicial department of the government. A correct diagnosis and a speedy application of the proper remedy is the work at present before us. Judges and lawyers began to realize that the tools and machinery of their profession, as furnished by the legislative department, were bringing discredit upon their fair name and their work, and that they would eventually lower the standing of the judge and the lawyer. Forthwith there came the demand that, if the bench and bar were to be held responsible for the results of the procedure of the courts, they, and not the legislatures, should be allowed to prepare that procedure. This demand has now reached the dignity of a national issue; but, before becoming so, the bench and bar suffered from an undeserved criticism that became a menace to the most important of the three departments of government.

These troubling thoughts have sunk deep into the souls of men whose first love is for their country. Their eyes are lifted above their vocation to the high level of their duty as citizens and leaders of society. "America," said Mr. Burke, "*owes its love of liberty to its lawyers and the people who understand the principles of government.*" It may be added that America will comfort and support its

lawyers in the demand for such a division of power as is needed for the proper operation of the machinery of the courts. The sense of the personal duty owed by the lawyers to the public and to the courts, that is inseparable from the high calling of their profession, has been electrified into a living, militant agency of reform. It has developed into an intelligent, organized effort in which judges, lawyers and laymen are co-operating. With a dynamic force, a self-abnegation and a display of patriotism unexcelled in any time or age, the judges and lawyers of this country have set about putting the courts upon the high level of the day in which they live. They are demanding the right to quicken their laggard feet that they may keep stride with the splendid commerce that long since outstripped it.

There are few public movements of the present day that mean so much to the general welfare, to comity, and to closer commercial and social relations amongst the States. The agitation of the question is opening the eyes of commerce and of society to their real relation and duty to the bench and the bar. To stimulate that movement is one object of this book. The first step in the program is the emancipation of the courts by the legislative departments of the State and Federal governments. After this is done, what remains will

offer no real obstacles other than those to be encountered in forwarding the present campaign of education.

The principle underlying this theme is the organic one of an equable division of power between the legislative and judicial departments of government. The program of the American Bar Association proposes to divide all judicial procedure into two classes, viz.: (a) jurisdictional and fundamental matters and general procedure and (b) the rules of practice directing the manner of bringing parties into court and the course of the court thereafter. The first class goes to the very foundation of the matter and may aptly be denominated the legal machine through which justice is to be administered, as distinguished from the actual operation thereof, and lies exclusively with the legislative department of government. It prescribes what the court may do, who shall be the parties participating, and fixes the rules of evidence and all important matters of procedure. The second concerns only the practice, the manner in which these things shall be done, that is, the details of their practical operation. Concisely stated, the first class provides *what* the courts may do, while the second regulates *how* they shall do it. Out of this has been deduced a plan, which is embodied in a simple statute

that has met with well-nigh universal approval. It is useful to emphasize that this statute will necessitate no alteration of the present procedure upon any jurisdictional or fundamental matter. Therefore, the preparation of a "Practice Act" or "Code," or the revision of a State code, is a subject entirely apart. After the rules are prepared there may be reason for the consideration of that subject, or there may not.

It will presently be authoritatively shown that justification may be found for this proposed division in the necessity for the preservation of a due balance between the legislative and judicial departments of government. But it appeals to logic and to the eternal fitness of things, inasmuch as it provides for a common-sense division of the actual labor to be performed and the responsibilities to be borne. While the legislative department should retain arbitrary control over the courts as an agency to an end, obviously, the best results to be derived from the operation of the agency are to be obtained by taking advantage of the genius, ability, preparation, experience and profound knowledge of the judges and lawyers, who, as officers of the court, personally conduct it.

But there is a psychological aspect not to be underestimated. The sense of responsibility

will awaken a new and unselfish interest on the part of the members of the bar, and will inspire their best efforts. Personal pride will play an important part in inducing them to support and maintain the new regime that would owe its existence and gradual perfection in large measure to the aid contributed by them. *This is really the human crux of the whole scheme.* Moreover, it will give to the people the benefits of the advice of their ablest lawyers and *will guide their criticisms in a harmless manner to a personally responsible and responsive agency.* Lawyers will be transformed from the hostile critics that they now are into the militant, helpful supporters that they should be. It will go out of fashion for them to pick flaws, even if it could then be considered ethical to do so. That thought cannot be too strongly stressed.

Now let us view the obverse of this picture. With the legislative departments prescribing the most trifling details and disregarding improvements suggested by bar associations, there is nothing for the judge and the lawyer to do but to submit and follow as best they may. This they have done nigh unto half a century, but not without loss of prestige; not without a lessening of popular confidence in the courts and lawyers, and not without the temporary lodgment of certain dangerous



doctrines in the hearts of the people. That resentment as well as a critical mental attitude should be manifested against this involuntary bondage is characteristically American.

*In its final analysis, the real trouble with judicial procedure is due to the fact that co-ordination has been absolutely destroyed by exclusive legislative control.* When, therefore, the lawyer places insurmountable barriers in the path of the court in its journey to the goal established and set up by justice and the merits of the cause, instead of being actuated by sinister and corrupt motives, he is merely seeking the enforcement of the statutes and asking that government be conducted in the manner that the legislative branch has seen fit to enact and to provide. He is doing merely his duty under his oath, and so is the judge who permits him so to proceed. What is the result? The lawyer acquires a reputation for that kind of thing, and, since he has earned it by enforcing the law, he is entitled to it. This course is neither unethical nor reprehensible. But what of the judge who, likewise, has but done his duty? He stands alone to receive the condemnation of the litigant, and eventually that of a dissatisfied and distrustful people, who do not understand and who can not understand. They would not know where to seek relief, even if it were pos-

sible for them to analyze the situation. Judging only from results, they are justified from their point of view in feeling that the thing nearest to them which is apparently doing the wrong should be throttled and destroyed.

This is one of the results of "code pleading" which is exclusively legislative. It is one of the results of common-law pleading long since abandoned in *propria persona*, but much alive as a legislative tatterdemalion, in which form resides its chastened spirit. The proposed new plan will co-ordinate the entire bar and the judicial and legislative departments and enable each to perform its proper function.

Obversely, exclusive judicial power would place in the hands of the judicial department control over fundamental and jurisdictional matters and general procedure. Such a grant of power would be in conflict with the spirit of our republican institutions, if, indeed, it would not violate the basic constitutional principles in which they rest. It is necessary to advert to it, however, since it is the antithesis of "code pleading" and a happy mean between the two extremes is what has been found to be most desirable. A sensible limitation must, as we have argued, be placed upon the power of the courts, a matter already effectuated to an extent, by suitable statutory

measures, as well as upon the executive and the legislative departments. But this limitation must not go to such an extreme as to defeat co-ordination, else the latter state of affairs will be as bad as the former. The proposed new plan, as has been stated, lies midway between the "all legislative" and the "all court" systems. It proposes to vest in the supreme appellate court of each State and of the Federal government the exclusive power to prepare for the respective *nisi prius* courts all necessary rules and regulations and the power, likewise, to amend and alter them at the demand of convenience or of justice. From this duty the legislative department would necessarily withdraw. All future pleading and practice would be in accordance with simple, correlated and scientific rules of court instead of being regulated by rigid, inflexible statutes, amendable only by legislative act. Of the form to be taken by these rules it is not now in order to speak. In an orderly manner opportunity will be afforded the lawyers to share both the labor and the responsibility. The task at present is to inform the people and their legislative representatives of the merit and policy of and the absolute necessity for a proper division of duty and power between the legislative and judicial departments of government. But it is timely to call atten-

tion to the necessity for some authorized, competent agency, clothed with supreme and final authority, to whose care may be intrusted the adjustment and determination of the matters in question. That agency is the Supreme Court of the United States, which Congress must set free to perform its logical duty. With this statement we may now venture upon a portrayal of the real spirit of the courts with the hope and purpose of stimulating a greater general interest in American judicature and its elevation to the high standard of the American bar.

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## CHAPTER I.

### JUDICIAL PROCEDURE AND JUDICIAL CALIBRE.

If I were requested to write the history of any one of the great governments that have ruled over the destinies of men since the dawn of the world, and had the ability to do so, I should be well content to follow in the wake of its judicial procedure. All else will bear its impress and reflect its glory or its imperfections. Next to religion, it has been the source of greatest contention in governmental relations. Men may agree on the form of laws, but they never agree on the manner of their interpretation or administration. There are three profound thoughts well justified by history that will be the keynote to what is to follow and to which is invited sober thought. A government is as good as the laws it enacts; it is as bad as the manner in which they are administered; and it is as strong and enduring as the faith of its citizens in its courts. Practically applied, what is judicial procedure? It is the divide between law and order and anarchy. It is the barrier between right and might. It is the guardian of civilization, and it is the handmaiden of the church, to which, alone, it takes second place. It mat-

ters not how good a law may be or how important it is to eradicate an evil at which a statute is directed, its potency and dignity is measured by the manner in which it is enforced. A lax administration begets lax methods and morals. Lax morals undermine a people, and a nation is no better or stronger than its subjects. It may be said, in passing, that the redemption of this nation and of all Anglo-Saxon people, is the occasional habit of rising up and bringing about a rigid enforcement of the laws through a prompt response by the courts and not through a destruction of the courts and, therefore, the government. This very fact evidences an unconscious faith in and respect for the potency of the courts, as it proves them to be of first importance and a last resort. And right well have they justified it. The body of the great common law is but the mature reasoning of learned and patriotic English jurists, through eight centuries of almost daily adjustment to the progress of commerce and society. The history of the Federal Supreme Court is an interesting story of the conflict and evolution of many years of interstate relations and the establishment of interstate commercial regulations. In bringing about this wholesome status the Supreme Court converted an inert parchment into a plastic, flexible tie profit-

ably binding the States together in amicable relation and automatically disposing of friction as it arises. Without fear of contradiction, it is asserted that no code of statutes prepared by a Solomon would have achieved this marvelous consummation so necessary to the stability of the new and untried Republic, even though the statutes could have been agreed upon.

There is no legislative body on earth that could have enacted enough statutes, and sufficiently elastic, to have momentarily met the kaleidoscopic developments and changes in interstate political and economic relations, during the early growth of this nation, with its diversified interests. This is equally true as to the last two decades, and the same will be true as to the next decade to come. Yet Chief Justice Marshall, his associates and their successors have created a body of rules of conduct answering both the rule of reason and the demand of convenience under which the States and commerce and society, with slight sacrifices of individual rights, have thrived to the extent of becoming the marvel of the world. As to these judicial laws, there was no appeal or repeal. They had the saving element of permanency, free from political bias and partisan influences. The people, therefore, philosophically acquiesced and fit-

ted themselves to the new conditions, though, some times, only after a respectable number had uselessly worried themselves into a state of temporary nervous insubordination. This was not without a useful purpose, since the submission which followed was conducive to a philosophical and thoughtful state of mind wherein the general welfare, and not personal pride, became the paramount object of citizenship. But what most appeals to us is that, still keeping alive a very necessary and agreeable State rivalry, we are essentially one for all and all for one—a nation of sovereign States, a family of prosperous children, actually willing to adopt uniform laws. In taking pride in this great nation, one looks upon the result as richly justifying the means adopted and as a measure of future governmental conduct. Generations yet unborn will point to this achievement as a fitting example for all ages to follow. This is the debt that we owe to the Federal Supreme Court, and particularly, if I may be permitted to say it, to John Marshall, Virginia's great contribution to the nation. His masterful personality is its warp and woof. Yet contemporaneous history shows that some well-intentioned but impatient people would have recalled this great builder of the government when he handed down the famous decision in "Marbury vs.



Madison." It brings to mind the words of the poet Dryden:

"Look around the habitable world! How few  
Know their own good, or knowing it, pursue."

The remedy was being applied and the patient was, as usual, temporarily rebellious. The hour of gratitude had not arrived. The mere mention of the circumstance to a thoughtful reader will serve a purpose. It will be discussed in another chapter.

Even lawyers have temporary difficulty in completely comprehending the full practical import of that one decision and its effect upon the politics, commerce and governmental relations of the times. The Supreme Court, still in its pin-feathers as it were, but conceiving its high mission, laid its hand upon the Legislatures of the several States and in effect said: You have commenced to quarrel, so we nominate ourselves as an umpire to interpret and enforce the letter and spirit of the contract into which you have entered, for somebody must do it in order to keep the peace and establish orderly conditions. Furthermore, since nobody seems to know exactly the duties and power of this Court, we will define them ourselves. In the future, if you enact a law appearing to us in violation of the Constitution, we will declare it void, and void it will

## 6 SPIRIT OF THE COURTS

be through your submission to constituted authority as loyal citizens. And with one exception, when the nation divided and the final decree was writ in blood and enforced through the arbitrament of arms, it has been going right along settling disputes between the States ever since. Out of the matter-of-fact present how that thought looms up to a grateful mental vision! Without regard to blatant political sentiment, deaf even to the clamorous warnings of the proud States of their birth; seeing only with the eyes and heart and head of constructive statesmanship the two roads ahead of the Republic—the one to internecine strife and ruin, and the other to a compact nation of independent sovereigns, magnanimously giving and taking in the daily conflicts of commercial, social and political intercourse—the Supreme Court made itself the necessary arbiter, the patriarch of the tribe, whose word was, has been and ever will be the law of this united country.

We are today peacefully going through an interstate industrial crisis of no small consequence, but which, like all things else, is shaping itself in the mould. Eight years ago there were people aplenty who predicted governmental and financial ruin if certain groups of selfish and unpatriotic persons were not permitted to continue taking personal advantage

of unsettled and conflicting State relations. The condition of law so created was popularized by the name of the "twilight zone." Within that time this Great Umpire and the State Appellate Courts, working in entire sympathy, have found rules and applied them; have interpreted law and enforced it, and, at their simple word, peace and order are rapidly coming out of the chaos of two decades. True, it has not pleased everybody either as to speed or extent, but the work has the saving grace of finality and a determined purpose. As it was not a day in the making, so it will not be a day in the unmaking. The roots of the tares have ramified and become entangled with those of the wheat. The operation of extraction is a delicate one. Without regard to political persuasion, the courts rightfully and safely rely upon a patriotic faith and patience of the people, that is the noblest attribute of citizenship. This trait of the American people is the corner-stone upon which rests the very existence of this Republic. Reference is popularly made to the absence of it in a people as a lack of preparation for representative government, and there never was a truer saying. One does not have to go far afield to find evidences of it on the American continent. Therefore, let me say that it is the sublimest duty to foster and en-

courage a proper submission and faith. Given time and the opportunity, the Supreme Court in an orderly and decorous manner, free from partisan bias, will reform pleading and procedure and will blaze the way in which the new and greater commerce and interstate relations may develop and move on with safety to itself and to the people. It will do this with proper regard for constitutional limitations and ancient principles and with a due consideration of the sacred trust of the future that lies before us. It is a problem no more difficult than was that so happily and finally solved by John Marshall and his faithful and able associates. It merely looms large by proximity, and is aggravating because of a necessary and natural slowness of solution and evolution. This profound faith, resting firmly upon past achievements, always gives renewed hope and inspiration when the raucous voice of the self-serving pessimist is disturbing the peace of a government that will be the hope-spring of liberty and justice when the memory of the most conspicuous and successful demagogue shall have faded away like a shooting star athwart the heavens.

In our deep concern for the present, let there be no alarm. Trouble adds to its stature by proximity and distrust. The same Providence that gave strength and courage

and deep conviction to our struggling ancestors is watching over the destinies of the important nation they so wisely established upon principles broad and profound. But the men of this generation must be as faithful to duty as their forebears. The need of strong courts and the speedy, economical and uniform administration of justice at this very time is even greater, if possible, than in John Marshall's day. His people were well disciplined by war, privation, provincial simplicity and a puritanical recognition of ethical standards. They were too earnest to be idle; too energetic to be discontented; too unselfish to be unfaithful, and too thoughtful to be satisfied with expediency. They possessed a reverence for government and an innate faith in and respect for the courts that made of a judgeship the highest honor in the gift of the people. Is there not at present a lack of it, whether or not justified, traceable alike to the indifference of the suffragan and the corruption of the politician?

We turn now, with a pardonable degree of serious thought, to some present conditions justifiably described as a state of mind that, admitted to exist, cannot safely be left unconsidered.

"If I could reach from pole to pole and grasp the ocean in my span,  
I would be judged by my soul, for the mind is the standard of the man."

Many well-meaning persons of this generation, instead of fostering an unselfish philosophy based upon the courage and deep convictions of their forefathers, who thought profoundly and acted wisely, if they be natives of this country; or, are unmindful of the unbearable conditions that drove them to seek shelter here, if they be adopted citizens, are showing evidences of a restlessness and an impatience that will surrender only to a proper realization of the genius of our government and their power and duty to perpetuate it; to the decent restraint due between man and his brother, and to a patriotic submission that is the life and hope of good citizenship. To all such misguided pessimists, even if they be entirely justified, are the words of Cowper most timely:

"Beware of desperate steps. The darkest day,  
Live till tomorrow, will have passed away."

Here lies the sublimest duty of the lawyer beckoning him to action. Trained in the science of government, its philosophy and its reason, sworn to uphold the Constitution and possessing the faith of his clients, as he should, he must become a missionary. It is believed to be the opportunity of the hour for patriotic

service. There lies before the Bar a field ripe to the harvest, impelled by militant convictions. In the sentiments of Father Ryan:

"Better a day of strife  
Than a century of sleep,  
Give me instead of a long stream of life  
The tempests and tears of the deep."

Our people, as pure at heart as any that ever lived, are thoughtlessly beginning an assault upon the one agency that distributes the life-blood of all governments. It is time for the patriotic lawyer to answer the demagogic hysteria of the political opportunist with the experience of history. England can trace the elements of her greatness to the Magna Charta, for it was then that the courts threw off the yoke of King John and the Crown and became independent. This was almost the direct result of the missionary work of Sir John Fitz Walter, inspired by the murder of his daughter, Matilda ("Maid Marion"), as the leader of the Barons until the capitulation at Runnymede. In England's courts afterwards lay her power—in reverence she found her strength, and the people their contentment and happiness, although at the cost of many a life and fortune and dark hours of despair. From the school of her common-law procedure have graduated the legal giants of history who spread the light of civilization and culture

into a then almost darkened world. From her Inns of Court, established for the purpose, came forth a body of law and a citizenship by whose example we well may profit. The people were educated to fit the law, and not the law the whims of the people. The animal spirit of man became disciplined and fitted for government. Man was not exalted above the law, whether prince or peasant. The King himself bowed before its majesty and power. In Rome the justly famous Justinian Code, more than a century in its making, is the distinguishing feature of the first half of the sixth century of the Christian era. In France the mighty warrior, Napoleon, reaching the pinnacle of fame by the sword, declared that his memory would eventually be commemorated through his civil code. Wherever the principles of justice are sought, the name of Moses is not forgotten. And, lest we forget, that while the greatness that was Rome lay in the perfection of her courts, for they were models for the world, when the finger of the prince was permitted to rest upon the hand of the judge as he signed the decree, the decadence of the Empire began. And it matters not whether that interference be by the prince or by the people, the result will be the same. What the Englishman demanded from the Crown at Runnymede, the Roman surren-



dered to the prince; the one became a conqueror and the mistress of the seas, the other the conquered and a by-word.

The times call for a more general and popular study of the elementary principles of government, that the body politic may realize that the difficulty is not with the courts as institutions, but with the conduct thereof; that we have outgrown some systems and have departed from ancient principles in creating others and in selecting judges; that this trouble is not permanent, but very temporary and local, and can be corrected by a properly selected personnel and a simplification of the procedure therein, both of which reforms are knocking clamorously at legislative doors. Therefore, the fault lies not so much with the people themselves, as with the lawyers who must lead and teach them. These are the two burning questions of the hour that are receiving the attention they deserve, and the solution, I profoundly believe, lies largely in divorcing the courts from politics and political influences and allowing them and the bar to clean their own house, where necessary, and to maintain it according to the high ethical standards of so noble a profession. The unquestioned tendency of the times is towards the very highest ethical standards.

Pursuing this thought, if lawyers and judges are to be held solely responsible, as in right they should, then they must be given the power to correct the evil by putting into practice all necessary reforms in the courts, the very first of which is the selection of suitable judges. Present responsibility cannot be permanently located, but shifts with the political tide, both as to the personnel and the procedure in the courts. And the latter is no less important. It is a pitiful present, and it will be a hopeless future, unless the electorate instructs Congress and the State legislatures to cease the present process of patching and useless amendment and turn over the entire reform of pleading and procedure to the highest Appellate Courts, assisted by the bar, where it logically belongs. Congress did this many years ago as to the equity side of the Federal Courts. But it has bound the hands of the Federal Supreme Court as to the common-law side. The people should rise up in their might and *require that Congress shall set the Supreme Court free*. It is a complete solution of the difficulty. For example, let us consider equity procedure in the Federal Courts. When the demand for a reform that had been needed a hundred years became sufficiently formidable, the Chief Executive, William Howard Taft, with a professional knowl-

edge of conditions and the courage of his convictions, officially called upon the Supreme Court, which, in turn, called upon the lawyers, and there was speedy action. A reformed equity procedure for the Federal Courts has gone into effect. On the other hand, his request to Congress to reform the law side of the courts, or to authorize the Supreme Court to do it, has gone the way of all things not politically profitable. And so will it ever be. Congress should be prevailed upon to do away with the empty pretense of conformity with State practice on the common-law side, provided in Section 914, Revised Statutes—the only excuse for its existence—stop patching conflicting and incompatible statutes, authorize the Federal Supreme Court to prepare a simple, economical, complete, correlated system of pleading and procedure, make it mandatory, and stop there. Let the Supreme Court do the rest. At present there are two separate and distinct systems of pleading and procedure in every State. Federal practice has, indeed, become a specialty, to which statement every lawyer will bear testimony. Laymen will certify to its burdens and delays. Every legitimate agency in the power of lawyers and laymen should be brought to bear to put an end to a condition daily taxing and vexing commerce and society. It is justly

a source of serious unrest. I repeat a statement often made and never denied, that we may look to legislative participation for disappointment only in result, expedition and permanency. With all due respect to the many earnest, honest and well-equipped men who compose those bodies, they suffer, besides others, from some of the same troubles as do the lawyers. From lack of preparedness, conflict of ideas, as well as indifference, there is much to be feared. But an even greater evil is the power and habit of amendment. *Besides, politics has no respectable place in jurisprudence.* On the other hand, the solemn voice of the Supreme Court would bring the entire bar and the people to a point of complete acquiescence. There would be permanent results the greatest of which, next to simplicity and economy, would be uniformity in pleading and procedure in the Federal Courts, and quite naturally amongst the States. In their own interest, there would eventually be adopted any simple, economical system that bears the *imprimatur* of approval of the United States Supreme Court, that has proved its merits in the Federal Courts and which has become certain and fixed through precedents. The detail of this will be discussed in another chapter.

Most earnestly it has been impressed upon Congress and Legislatures, and it is now repeated, that the enactment of substantive law is a secondary matter in comparison with judicial procedure. Time and again illustration has been given that judicial procedure is to the substantive law what the arteries are to the human body; that the latter is worthless without the former. It is an adage in medical diagnosis that a man is as old as his arteries. It is a truth in jurisprudence that a law is as useful as the procedure through which it is enforced. It matters not how much good, rich, pure blood one may have pulsating in his heart if the arteries through which it is distributed to the human system are clogged or inefficient and fail to perform their function, gradually there comes the certain death. Without in any sense wishing to be an alarmist, but stating a legitimate logical deduction, so surely as the human heart connected with clogged arteries must eventually cease to beat, so certainly will a government retarded by clogged judicial procedure surely decay. This is the history of the world. Turning from the courts, the people will first arbitrate and then they will fight. Once resort is had to the arbitrament of arms, might and not right will be the measure of civil liberty and property rights. The divide between law and or-

der and anarchy being but a submission inspired by fear, or by the faith and respect of the body politic in and for the courts, it is too delicate and dangerous an element to be made a political pawn. With it men are dealing with fire, and they need to take a sober second thought.

"A thousand years scarce serve to form a State;  
An hour may lay it in the dust."

Believing these things, or even fearing their possibility, as one may, is there a more patriotic duty in the noble profession of the law or in citizenship than the profound obligation to encourage, foster and make justifiable that faith in the judicial procedure of this country which is the very breath of its life? Impatience, recently at high tide, is tugging at the anchor of the old ship that has held it fast to its ancient moorings. This is a time for lawyers and all lovers of representative government to stand fast in their allegiance to established principles, suitably garbing them to fit the temper of the hour. With this thought in mind, let us take a little more analytical view and repeat a definition that seems to have stood the test and met with the approval of the critics.

Judicial procedure is composed of the judge, the man, with his power and mode of reasoning—the procedure in his court, with

the written pleadings, rules, precedents and traditions that restrict and confine his individuality, limit his personal power and make of him the true impersonation of the blind goddess of justice. Like a complete machine, each part has its important function.

Now let us be perfectly frank in discussing the man. The time for temporizing and platitudes has passed. While I do not agree with any such complaint, it has become fashionable to declare that there are not as many able men upon the bench as there were twenty years ago; that political influence has outweighed merit in their selection. Let me say that that criticism comes with poor grace from a people who, by uncomplaining acquiescence, justify their legislators in a parsimony in compensating judges that would reflect credit upon a miser, while at the same time they are permitting in many States political clerks of the same courts to be compensated in fees amounting to many times their just desert. It is just such inequalities, such political expedencies that are eating away the peace of the present and the hope of the future. Out of their own conduct shall they hear condemnation. How could a self-respecting man so justify any such course of government as to wish to serve it for a pittance, even if he were financially able to do so and desired to make

a contribution to the public treasury in times of peace? But by what right do Congress and the Legislatures demand that a lawyer shall sacrifice a lucrative practice commanded and held by his ability? Has service upon the bench been placed on a war basis, requiring that a citizen, responding to the highest call of patriotism, may be drafted into service in order to save his country and maintain the high standard of the bench? Self-respect is the essence of patriotism. Judges, no more than other men, can live by glory and patriotism alone. They owe a duty to their families, if not to themselves, and they should be financially independent and comfortable in mind. Therefore, service upon the bench must be made attractive by way of compensation as well as honor.

Furthermore, the people in many States have successfully demanded the right to select their judges at the polls, in some cases subjecting them as a prey to designing politicians by not coming to their rescue with sustaining majorities. The judiciary in such States may descend to the level of a high constable unless the electorate is itself of the highest type of citizenship. The shallow-brained but loud-mouthed demagogue outweighs the quiet, dignified man of deep-rooted principle, judicial temperament and unflinching courage. Again,



for reasons that have already been set forth, and still having in mind the absolute independence of the judge, there should be life-tenure, with provision for retirement upon a suitable pension, and a prompt, simple and cheap way of calling the judge to judgment, of which I shall speak later. Such an arrangement would naturally attract able lawyers of a judicial temperament and well fitted for that service of the bench which ought to be the greatest honor in the gift of the people. Judges should be recruited from men not lacking in repose, but suited in disposition and desire, men free from the nervous impatience and thirst for power and pelf that might bind them to commerce.

Having made the judge independent, it is of first importance that he should be placed in convenient and economical reach of the people whose official servant he is. There has already been suggested the need in the Federal system, and wherever life-tenure or long terms prevail, of a speedy, simple, inexpensive manner of preferring and answering charges concerning the conduct of judges. It is incompatible with American manhood that the people will rest content under the belief that any official or man is beyond the reach of the law, whether through political influence or chicanery, the operation of statutory law or the

expense and delay of the legal remedy of impeachment. The effect is exactly the same. Impeachment should be made to fit the crime, instead of being the plaything of politics or a club in the hand of spite, and it should not be the only way of bringing a life-tenure judge to judgment. It is too often the case that the layman, through ignorance of the law, and the lawyer, through indifference or fear and sometimes with the hope of profit, has reached the conclusion that a life-tenure judge, particularly a Federal judge, is out of the reach of the man without influence. In isolated instances "thrift has followed fawning," but, as a general rule, resentment and opposition naturally followed upon the heels of this conviction. Wherein the public is becoming like the man who kept fire out of his residence and died of pneumonia, because of the fear of burning up his house. It is more sensible to keep the fire under thorough and immediate control and profit by it. Some time ago I suggested a possible solution of this problem, and some sort of a solution must be promptly had in order to appease a very respectable number of people.

This solution is a Judicial Court of Inquiry, the prototype of which may be found in military and naval law. A limited example and complete justification of it has recently been

furnished by a Congressional Committee of Inquiry in the Archbald case. While the prevailing principle is right, the practice is wrong and expensive as conducted by Congress. The trial must be brought closer home and not held within the exclusive walls of Congress. When, in the opinion of the Chief Justice, sufficient cause is shown upon a verified petition or communication to that effect, provision should be made for the immediate selection by the Chief Justice of a court of three to five judges to sit at the trial. The *personnel* should be made up of presiding judges of equal or superior dignity and from different grand divisions of the country, who could in no way profit by the outcome and who would represent every ethical viewpoint. Charges and specifications should be prepared and served in advance, and the accused should be required to appear in court in person at a public hearing held where the alleged improper conduct was committed. Before such a court there could be defined and considered the trinity of evils that destroy the usefulness of judges—*corruption, ignorance and subserviency*. This court could not impeach, but the result would be the same. Congress and Legislatures would respect its findings. The effect would bring to the great body of the people the consoling and peaceful thought that an

improper judge was speedily within their reach, and it will help allay the dangerous agitation for the recall of judges. There would be no need of it. The expense of this court would be negligible, its selection would be ideal, its effect would be as wholesome as its prototype is in the Army and Navy and the National Guard, and there would follow a peace and contentment that is the concomitant of faith and respect and the realization of the power of self-protection.

I venture again to suggest that dissatisfaction with judges is not the outgrowth of honest decisions or big matters, in the absence of questions of political significance. The average man is a good loser where he has had a fair chance. It is on account of the aggregation of little things of which the press never hears and under which the complainant, chafing in impotent helplessness, sows seed of dissatisfaction that need but little demagogic fertilization to germinate into a governmental menace. With the right in the judge to demand an inquiry and the power in the citizen and the lawyer alike to prefer charges, an ever fair-minded public will not permit irresponsible mongering of scandal or unguarded expressions of criticism. It will go out of fashion to speak loosely of courts and it will come into fashion to lay charges where justified.

Thomas Jefferson expressed the opinion that "when a cause has been adjudged according to the rules and the forms of a country, its justice ought to be presumed \* \* \* Multiply bodies of revisal as you please, their number must still be finite and they must finish in the hands of fallible men and judges."

Grover Cleveland prophetically said: "To me nothing can be more deplorable than that open criticism of the decisions of courts which, all at once, has become fashionable \* \* \* they are danger-signals, and failure to see them may introduce practices which will threaten the independence of the courts \* \* \* If their decrees are not respected, or the judges who preside over them are not men of the highest reputation for ability and fairness, then all the forces of discontent will unite in an assault upon them."

As important, therefore, as is the simplification, expedition and reduction in expense of pleading and procedure, the selection of judges stands forth as an issue by itself. Chief Justice Marshall said: "The greatest curse ever inflicted by an angry Heaven upon an ungrateful and sinning people is a corrupt, dependent or an ignorant judiciary." *The most enduring monument that any Chief Executive can erect to his lasting and grateful memory, whatever may be his political creed, will be*

*the act of eradicating the influence of politics from the selection of judges and from judicial procedure.* Daily there is justification of the conviction that of the trinity of evils that go to make bad judges—corruption, ignorance and subserviency—the worst of these is subserviency. The stench of corruption eventually reveals its presence; the blunders of ignorance are awkwardly visible to both parties to the record; but the stealth of favoritism is apparent only to the expert professional eyes of unwilling witnesses. Few lawyers can afford and all regretfully perform the patriotic duty of pointing out the occasional unfit judge for whose existence this country is dearly paying. It cannot be too often repeated that judges should be men who, now and always, have understood and lived up to their country's best traditions; who draw their inspirations, as a matter of right, from the firesides of the representative people and not from the influence of or respect for their high office. No man with political debts to pay, enemies to punish, friends to favor or dependents to be supported out of the assets of litigants, is fit to be a judge.

## CHAPTER II.

## RELATION OF JUDICIAL PROCEDURE TO UNIFORMITY OF LAW.

Let us now give attention to the American national aspect of the procedure of the courts. There is being earnestly and successfully urged the necessity for uniformity in the law of the States. The uncertainty, the lack of confidence in extending credits and the costly conflict and delay that continually arise in the execution of the simplest transaction, and in litigation incident thereto, have been emphasized. The suggestion is offered that uniformity in interpretation is as important as uniformity in enactment of statutes. And we must go yet a step further; judicial procedure must be made uniform as well as simple, inexpensive and expeditious. Let us consider it with that meed of reverence justly due to those elementary principles underlying our republican form of government and the protection to liberty and property rights, to which attention has already been directed.

Into this thought enter the judge—the man, with his power and mode of reasoning—the procedure in his court, with the rules, precedents and traditions that restrict and confine

his individuality, limit his personal power and make of him the true impersonation of the blind Goddess of Justice. It is asserted without hesitation that, though every statute in every State were made uniform in word and letter, the courts, by failing to follow their manifest spirit and intent or by contrary rulings, could nullify that work in one decision.

Consider the much-heralded Uniform Negotiable Instrument Law, the result of years of unselfish devotion. What is its fate? Its President reported to the Commissioners on Uniform State Laws in 1909 that, though this statute had been adopted in thirty-eight States, Territories and the District of Columbia, some of the courts were destroying its purpose by lack of uniformity in decision. These courts had simply failed to recognize and permit to become operative the announced co-operation of thirty-eight Legislatures in enacting identical laws dealing with matters of common interest to commerce, finance and society. This is said not in criticism of a theory of law, but as the statement of fact. So long as lack of uniformity in decision is progressing, uniformity in law is retrogressing.

It is proposed, then, to demonstrate clearly the fatal fact that the machinery of the courts measure the potency and the dignity of the law, and before there shall be obtained *uni-*



*formity of law* there must be brought about *uniformity of decision and practice*. That this is impossible in this enlightened country, where the brains and brawn and money of the men of every State is commingled in a common effort of uplift, civic improvement and industrial advancement, a normal person refuses to believe. Never in all the world was there such solidarity of purpose, such fraternal co-operation and such unity of effort as exists today throughout this great, fruitful and prosperous country. Commercially and socially, it is made one by transportation, telegraph, telephone and newspaper service and facilities. The one section depends upon the labor, fruits and industries of another almost like the members of the human body itself. If the same law is acceptable to all the States, why is not the same interpretation of that law acceptable? And why cannot it be made so?

It is commendable of the fearless independence of those great jurists that even the members of the Supreme Court of the United States do not always agree in reasoning or result. Permanency and uniformity of decision are not, thereby, disturbed because of the finality of the majority rule. Now the interpretation of a State Appellate Court, reached by the majority thereof, is equally *permanent as to that State*. But thirty-eight States have

adopted the statute and, without concert of action by these courts or some rule of conduct, there may be thirty-eight interpretations of the law. So if it be necessary for uniformity, why cannot the judges or the presiding judges of the different Appellate Courts exchange views when a new uniform statute is enacted, and, if they fail to agree upon its meaning, let the majority rule. A congress of courts, I venture to suggest, is within the spirit of uniformity. It is no impingement of the dignity, nor a breach of the ethics of courts, to confer together. It is no sacrifice of States' rights. Rather is it an advantage to State interests. A cardinal rule of interpretation is that when a State adopts a statute, its courts shall follow the interpretation reached by the highest court of the sister State first adopting it. In the final analysis we are, after all, but members of one big family living on one big farm, subdivided by imaginary political lines. We need a little more neighborly gossiping over the back fences by the courts for a realization that the adoption of identical statutes calls for the rendering of identical decisions. This great problem we wish to consider not with the promise of a specific remedy, for that will be discussed later, but as a call for patriotism, a broadness of vision and that degree of unselfishness that tends to the general good.

"No State," said Senator Root, "can live unto itself," and by the same token I wish to add that no State Appellate Court ought to do so.

One cares much as to what is written upon the statute books, but much more as to how it is enforced. We may well cherish the hope of uniformity even as we rest trustfully in the sacred limitations guaranteed in the Constitution, but the extent of the achievement of both is measured absolutely by the courts. No apology, then, is in order for considering these vital questions, for they will play an important part in the future, as they have done since men first abandoned the arbitrament of might and arms and sought courts of justice in settlement of their differences, as we have already briefly shown. To such an extent is this a fact, as has also been seen, that the pleading and procedure of the courts of every country reflect the genius of the government itself. We have already seen that imperialistic Rome, with the highest and best laws that ever blessed a people, would have scorned the common-law pleading of England that was made to stand, and did stand, as a barrier between the prince and the citizen and as a guarantor of decisions reflecting the true law, the expressed spirit of the time and not the pleasure of the prince, the judge or any other power. Pleading is the vehicle through which all law

is enforced, and excepting a good judgment, wisdom, patriotism and fidelity to duty, it is the only restriction and limitation upon the individuality of the judge and the direct interference of the government or other power. As a people we have grown indifferent to or lost appreciation of the truth that it matters not how good a law is or what might have been its beneficial purpose, it becomes bad, if not vicious, when improperly or inadequately enforced.

Judicial procedure is to law what the aqueduct and water pipes are to the great reservoir where the water is stored. The quality, quantity and usefulness of the water, however pure its origin, depends absolutely upon the aqueduct in which it is conveyed to the city and distributed. If that be broken and leaky or inadequate, the supply actually received by the people will be uncertain, slow and insufficient, and all commercial and social efforts must suffer accordingly. If the aqueduct be foul, so will the water be contaminated and spoiled for the merciful use for which it was intended and becomes the very antithesis of an agency next to godliness. So patriotic and learned men may fill the statute books with the wisdom of a Solomon, but the usefulness thereof will be limited and measured by the judicial procedure through which it is admin-

istered. That the thought may be emphasized, it is desired to repeat that if judicial procedure is to be reformed it must be reconstructed as a scientific, correlated whole, else the last state will be worse than the first. On the other hand, it is not necessary to be seekers after innovation in order to improve. We are so fortunate as to have inherited a model, briefly described in another chapter, from the same source from which we took the immutable bases of our laws, a simple, economical, expeditious system amended down to date, which can be made to fit American conditions. It is as old as English civilization and as new as the most modern idea. In it there looks down upon us eight centuries of legal history and civic struggle. It has made the humblest man as strong in court as the greatest aggregation of power. Happily, though business is vexed by lack of uniformity in judicial decisions, there are as yet no imperialistic clouds in our governmental skies threatening civil liberty or property rights. But "the price of liberty is eternal vigilance." To offer temptation is half the sin, for it is an invitation to transgression. It is not too much to say that upon uniform judicial procedure and decision largely depend the fostering of closer political, commercial and social relations amongst the States. The best practitioner in Virginia

today is lost in a North Carolina or New York court, and vice versa. This is as devoid of reason as it is unneighborly. A simple model Federal system is the key to achievement, as we shall presently show.

But there is another and a fundamental reason we would prove false to a profound conviction not to emphasize. However advantageous uniformity in procedure and decision may be to men of national business—for commerce has long since leaped over the imaginary political lines separating the States—it becomes a negligible quantity in the light of the profound fundamental matter of perpetuating the dual relation fixed by the founders between the State and Federal governments. I venture to predict that States' rights will be gradually absorbed unless the State Legislatures suitably accommodate their local laws to the manifest needs of interstate commerce. The preservation of State autonomy, we are taught by the founders, means the guarantee of the true liberty against certain difficulties and a possible oppression from centralized power.

But who shall perform this important work of preparing a fixed, uniform system of permanent rules for the regulation of judicial procedure of all the courts—Federal and State? There is but one answer—the highest

Appellate Court in the United States and of the several States (until all the States shall adopt the Federal plan). The Bar has given repeated assurance that it stands ready to render such practical assistance as may be found convenient and may be requested of it, through the agency of a commission or otherwise. It is an indication that there abides in the people of this country a sublime faith in their highest tribunal that makes of submission the noblest attribute of national character. "In reverence is the chief joy and power of life," says Ruskin, and it is an unmistakable evidence of unconscious bravery and unselfish patriotism. Nothing but the solemn voice of this great source of Justice will subdue the belligerent cocksureness that may be expected, or solidify public opinion to the point of complete acquiescence and forceful support. It will be encouraging to be mindful that pride of opinion of individual lawyers forced upon the ancient Romans one hundred years of struggle and dissension in perfecting the Justinian Code, and that it has taken the English eight hundred years of cooperation to reach their present state of perfection. There are reactionaries holding high legislative position who would repeat history in America.

Our next thought, heretofore suggested, is that judicial procedure must be fixed and established because of its salutary limitation upon the human element entering into its warp and woof. With strict reference only to enforcing rules of pleading and procedure, the relation of the presiding judge to the litigants and the authorities is analogous to that of an umpire in a game. It is his province to administer, not to make rules. It would be a dangerous umpire who made his rules as he enforced them, but a very just and safe one who enforced existing rules regardless of his personal inclinations or the personnel of the players. In that particular there forcibly appears the distinction between the civil and the common-law practice heretofore pointed out. The donning of the ermine takes away none of the human frailties. It is not a question of honesty of purpose, but one of natural limitations. Gratitude, one of the cardinal virtues, may become in a judge a vicious weakness. No two men see, understand, are impressed or appreciate alike under exactly the same conditions if left uncontrolled, which is the reason that the law is worse than meaningless when left to unfettered individual inclination. The strongest supporters of that statement will be found among the men who adorn the Bench. A keen sense of duty but accentuates



the weight of responsibility and bestirs a corresponding gratitude for every legitimate help that lessens or lightens it. Belief in human infallibility is symptomatic of imperialism or insanity.

The opinion is ventured that the general public is sometimes amazed at the broad power properly possessed by the courts even within these legitimate limitations. This power finds its security not in the words of constitutions and statutes, but is derived from the innate sense of justice and love of the people for right, truth and fair-dealing between man and man and between government and man and their respect for constituted authority. It translates the highest type of administering restraint by the rule of reason. Courts draw no power from transgressors. A court that dispenses impartial justice, though its decision be temporarily unpopular, is as strong as a hundred million patriotic people can make it. How important it is, then, to justify this faith in fact and in appearance. Most regretfully is it submitted for consideration that the test of popular strength in America today is robust honesty. It ought to be a most commonplace thing instead. The strongest man and the one who does the most good is not the individual whose mouth is filled with platitudes, but he who dares to do right him-

self and to force others to do it. I have enough confidence in the deep-rooted sense of justice of the average citizen of America to implicitly believe that he would fight to the death for any judge who stood for what that judge believed to be right, just as he would condemn and expose partiality, wrong and corruption. That is the impelling force holding up the hands of American courts. All of these things, too often overlooked, play their important parts and must be considered in the important task now before the American people of perfecting judicature. They are written in order to emphasize that *the administration of justice needs to be brought up instead of down to the level of citizenship*, and must be made as nearly nationally uniform as is humanly possible. The noisy brook has been diverting attention from the deep running river upon whose placid bosom only the ship of state can float.

I am inspired to believe that we are living in a time when the voice of civic uplift and advancement is being heard in legislative halls, the counting-room and in the innermost executive and judicial chambers. The public conscience is awake to a lively sense of duty. There is being reincarnated the spirit of the patriots who founded this government. Men are being brought closer together in the com-

mon ties of humanity, mutual benefit and brotherly love. They are heeding the call of the fellowship of man, the general welfare and the common good, and at the call of a common need are reaching a state of mutual appreciation, understanding and tolerance. The voice of the zealot and of blind partizanship is being heard less and less. The dawning of this new day is casting its fresh sunshine from one end to the other of our country. It is melting its way through barriers that the laws and force could not penetrate. It is developing into lusty strength principles that have been sacrificed to political expediency, and it is filling the hearts of patriotic men of every position, condition and creed with a new hope and a new effort. Encouragement must be given this sentiment by the selection of a suitable judicial personnel as well as providing a simple, uniform procedure for the courts, and we cannot dwell too much upon the former. Judges should be men who now and always have understood and lived up to their country's best traditions, who draw their inspirations as a matter of right from the firesides of representative people and not on account of the influence of or respect for their high office, and with whom "thrift will not follow fawning." No man with political debts to pay, enemies to punish, friends to favor or depend-

ents to be supported out of the assets of litigants is fit to be a judge. If there shall continue to exist that lofty spirit of unselfish patriotism, faith in the government and respect for the courts; if the real people are to be brought close together and close to the heart of the government at Washington in order that the ideal of uniformity shall be nationally acceptable, it will be by destroying all antipathy to the Federal courts and creating instead that admiration, loyalty and respect that Americans dearly love to pay to their faithful official servants. In the Federal courts let us feel that we are in the house of our fathers, from which models should properly come, instead of a foreign court. Uniformity of legislation is a necessary convenience, but uniformity of administration is a fundamental necessity, and it cannot be achieved except through the adoption by the several States of an acceptable Federal system.

## CHAPTER III.

EXPEDIENCY MUST NOT SACRIFICE  
PRINCIPLE.

Former President Taft, some years ago, officially declared that "The great question now before the American public is the improvement of the administration of justice, civil and criminal, both in the matter of its prompt dispatch and the cheapening of its use." He was none the less forceful but more ornate than a distinguished poet who said: "For forms of law let fools contest; that which is best administered is best."

Assuming then that there does not exist a dissenting voice against the effort seeking to simplify, lessen the expense, expedite and make uniform the pleading and procedure of the State and Federal courts, the paramount thought is the preparation and agreement upon that system of practice very nearly producing the desired result and reasonably meeting with individual theories and inclinations. In its consideration let us hope that we shall be free from that belligerent cocksureness that is the outcome of superficial or extemporized knowledge and that there will be kept in mind the importance of pleading, its history, its

traditions, its evolution, its difficulties and its dangers, which in this and future chapters we shall endeavor to bring to mind. In another place it will be shown that the present trouble is fundamental and lies in the processes of the government itself. The proposed remedy, it will be seen, is the fruit of the matured wisdom of the ripest scholars of the English-speaking world. Its application requires no departure from fundamental principles, no sacrifice of ancient landmarks, and involves but slight surrender of individual inclinations. But it demands a broadness of vision and that degree of unselfishness that tends to the general good, the sinking of pride of opinion and a spirit of accommodativeness. Nor is it necessary that its ends should be obtained at the sacrifice of certainty and stability. On the contrary, these will be assured, including perpetuation of the principles of the common law. By wholly abolishing technical common-law procedure, rigid conflicting statutes and substituting therefor scientific correlated rules of court, there will be attained a simplicity that will state the case in logical manner and with an accuracy that is free from subtlety. Practically, it means pleading the facts without the circumstances, omitting conclusions of law and evolving a single issue of law and fact. Without indulging in the vain hope

of the sciolist, that every litigant may be his own lawyer, it is certain that in this way pleading can be made as simple as it is now complex. It is proposed to discuss the elements entering into this thought.

Inasmuch as it is proposed that the new system of rules of court shall possess the virtues and avoid the vices of both common-law and Code procedure, we must not be unmindful of the different schools of thought that enjoy the favor of ripe and patriotic scholars. To that end let us review as much in their own language as possible the opinion of some of the ablest exponents of common and civil law pleading. Doctor Tyler, a common-law partizan, in his preface to the American work of Stephen on Pleading [3rd Am. Ed., 1892], bitterly resented *any* departure from that ancient practice, particularly "Code Pleading." Let us consider his views first. "The love of innovation," said he, "induced the State of New York some years ago to abrogate common-law pleading and introduce a code of procedure for the regulation of litigation in her courts; and, notwithstanding the lamentable confusion and uncertainty and the greatly increased expense which has thereby been brought into the administration of justice in that State, other States have followed in her

track of barbaric empiricism." Mindful that the few advocates of common-law pleading look upon it as a fetish, a purpose will be served in permitting the spirit of Dr. Tyler to carry us a little further into history in the search for the inspiration of its origin and the reason for its destruction. Today it has no place in the world except in five States in America. His failure to distinguish between the unparalleled merits of the common law and the machinery through which it was finally enforced will become obvious. The scholarly law-givers of Rome spent nearly a century of constant application in reaching what was finally the Justinian Code. That a keen sense of right and an abhorrence of wrong dominated the Roman mind in framing all their laws will not be disputed, though our English progenitors found the necessity of disagreeing for other reasons. That their potency was lost in the processes of administration proved a warning and an inspiration to Englishmen. Inasmuch as it is given to us to profit alike by the failures and successes of two great peoples, from whom we have inherited a rich legacy of precedents and traditions, there is neither necessity nor excuse for a serious mistake to be made. Although modern statutes and decisions are creating a place requiring consideration, there are known in



history two great systems of law—the civil law of Rome and the common law of England. All procedure must be adapted as vehicles for enforcing these principles. With the exception of Louisiana, the States of the Union are influenced by the common law of England, if, indeed, the law of those States is not the common law except where modified or abrogated by statute. It need not be said that it is a decadent jurisprudence that rejects the foundation provided by the maxims.

Consider first the procedure of the civil law; it appears that there is impressed upon it the influence of the three great political periods of Rome, viz: the period of the Kings, the period of the Republic and the period of the Emperors. The pleading of each period faithfully reflects the spirit of the people and of the government thereof. The evolution of the civil procedure, on account of its imperialistic tendency, commands investigation, in that it seems not to have been so much a legislative as a judicial growth, one responding to the convenience of the prince. Thus, while “the written reason of the Roman law has been silently and studiously transfused into all our modern legal and political life,” its pleading and procedure has not done so for the reason that personal judicial inclination became a substitute for juridical science. We

are told "that there was given to the chief judge ('Prætor Urbanus') authority to provide new rules and orders applicable to special cases which might be brought before him." Let us see how it operated. "If a person complained of an injury for which the old (then existing) law offered no remedy, the Prætor Urbanus could, upon a statement of facts by the party, allow him an action and put the facts, with a proper judgment upon them, into a certain formula for the information of the *judex* to whom he referred the matter." Now this sounds very much like making the law and the procedure to suit the case. There was a menace to justice in this arbitrary or conflicting procedure, particularly as administered by a weak or subservient judge. It fostered distrust, and often disrespect, for the courts. They became to be despised as tools of oppression instead of being revered as the sacred agencies of justice. So "it became the custom for Prætors, on entering upon their office, to publish an edict declaring the principles upon which they intended to administer justice during the year of their prætorship. By this practice the Prætor would appear to the suitors to be governed by pre-established rules and not to be influenced by the special interest of any particular case. His administration would,

therefore, be *felt* as more impartial and just." This was so obviously expediency sacrificing principle, "that few were deceived and the end was not deferred." Without reference to the days of the Republic, when great principles were established, but following the trail through imperialism, there will be noted the continuance of this policy of opportunism from Augustus Cæsar and his successors down to the days of the well-remembered Emperor Justinian, whose code is the distinguishing feature of the first half of the sixth century of the Christian era.

Dr. Tyler states that, upon the overthrow of the Republic and the establishment of the Empire by Augustus, we seem to find the first real contention regarding the establishment of a scientific and fixed system of pleading and procedure which was of sufficient importance to make its impress upon history. In what then occurred, history is faithfully repeating itself today. In its very incipency Capito, "a lawyer of enviable fame," "maintained that the forms of legal procedure as well as the jurisprudence itself must each change to suit the period of progress and the new order of things." Labeo, another great lawyer, "was utterly averse to changing the strict technical forms." We are told that the controversy thus begun lasted nearly a cen-

ture, and out of the strife arose the civil code, a mixture of both adjective and substantive law. The records show that so many lawyers and jurists debated it with acrid tempers that the Emperor, Valentinian III, ordered that none should be given credence except a selected committee of five. It is in order to say, parenthetically, that this history justifies the hope expressed at the beginning of the chapter—that pride of opinion should be sunk under the nobler weight of patriotic unselfishness. Unselfish love of country is more potent in bringing order out of disputation than an imperial ukase. Thus it is seen that the absence of any accepted system of pleading and procedure supplies a reason for the criticism of the civil law, that the “machinery for carrying it into effect has been confounded with the law itself,” and that a constitutional principle of the latter is the dogma, that whatever pleases the prince has the force of law. There was no such thing as an *obiter dictum*. We may now with profit turn from this picture to its obverse; from the sunset of juridical decadence to the dawn of a new public spirit and governmental life, policy and law. For all the wealth of the world, the glory of imperial dynasty, can not be weighed in the balance against the life of liberty.

The common law of England found neither its birth nor its maturity under the conditions just described. Responding to a militant English spirit then developing into the dignity of organization and translated into a Magna Charter, there is evidence of an appreciation of liberty and impartial justice wherein precedent unconditionally bound the successor of each judge, providing no opportunity or excuse for a "personal ruling" or a prepared case, as in the civil law. In this may be found a reason for the unyielding and highly technical character of the original common-law procedure, which was as much the creature of dread as of reason. Apprehension as to interference by the Crown or other influence drove England to the other extreme, and so the day of the Prætor Urbanus was legally over. The courts no more followed the person of the King and the pleasure of the judge. "There became a fixed rule of decision and a stability and certainty of pleading and procedure," says Dr. Tyler, "which has ever marked it down to this day." That procedure suitable to the controversy, which had to be strictly followed, was required to be used by the pleader as a condition precedent to the right of appearance in court and the *probata* had to correspond with the *allegata*. It was as immutable as the Twelve Tables of the

Roman Republic or the laws of the Medes and Persians. A James II, with his Jeffries, became an unfragrant and warning memory. Thus, in the fullness of time, pleading and procedure became as nearly a fixed science as it was possible to make it; became distinct from the substantive law; stood as a complete antithesis to the "personal" system in vogue under the Romans, and a barrier between the prince and the citizen, except through its orderly way. "The common law," Mr. Stephen declares, "in broad contrast to the civil law, has always wholly repudiated anything as authority but the judgments of courts deliberately given in causes argued and decided. 'For,' says Lord Coke, 'it is one amongst others of the great honors of the common law that cases of great difficulty are not adjudged or resolved *in tenebris or sub silentio suppressis rationibus*, but in open court, and there upon solemn and elaborate arguments.' " Historic justification is felt in the declaration that the law is meaningless when enforced without regard to fixed rules of procedure and precedent. It is worse than meaningless when left to the pleasure or convenience of any man. "The opinion of no lawyer," we are solemnly informed, "has a place in the system of the common law. And this wise principle is never lost sight of by those bred in its spirit."

There is no better evidence of its justification than the commentaries of Lord Coke, who faithfully quoted precedents. In his Second Institutes he criticises this weakness of the origin of the civil law "and its many diversities of personal opinions" as being "like a sea full of waves." Let us not abandon these great guiding principles of the common law. There is no need to be revolutionists in order to be reformers. But it is necessary to modernize and scientifically simplify.

"Nothing but the solemn voice of the law itself," said Dr. Tyler, "speaking through its constituted tribunals, is of any judicial authority. And how august is that authority reposing, as it does, upon the solemn decisions of courts which have administered justice in the very same halls for nearly eight hundred years. In vain shall we search the history of nations for a parallel to this state of law amidst the fluctuating vicissitudes of empire. It is this stability of law ruling over the prerogative of the Crown and administering equal justice to the high and the low, through so many centuries, that vindicates the frame and ordinary course of the common law to the consideration of the present time. \* \* \*

It has the great advantage of producing certainty in regard to all rights and obligations which are regulated by law. But, above all,

it excludes private interpretations and controls the arbitrary discretion of judges. In the common law the principles of interpretation are fixed and certain. \* \* \* The object of judicial proceedings is to ascertain and decide upon disputes between parties. In order to do this it is indispensable that the point or points be presented for decision. \* \* \*

Of the manifest protection against imperialistic tendencies and assaults upon civil liberty he also said: "At the very time that the Tudors and the Stuarts were grasping at high prerogative the common law was maturing its vigor in the courts. Coke, one of their judges, did more to develop and *organize it for protecting the individual against arbitrary power* than any man who has appeared in the progress of English society. In him the professional instinct of the common law had reached its sublimest sense of human right. He saw that the English Constitution drew its whole life from the common law and was but the framework of its living spirit. In all the various revolutions, with their dark and dreary scenes of bloodshed, through which England has passed, the people have clung to that ancient law with a devotion almost superstitious." Then the author brings this great thought home to Americans, "When our forefathers established governments in America



they laid their foundation on the common law. When the United Colonies met in Congress in 1774 they claimed the common law of England as a branch of those indubitable rights and liberties to which the respective colonies are entitled. And the common law, like a silent Providence, is still the preserver of our liberties." These great principles have been preserved in all their vigor and enforced in England through court-made rules for far more than fifty years. Why not in America? We may not hope ever to attain an ideal pleading, for many ephemeral questions will always vex. Therefore, let us deprecate the attitude of unreasoning antipathy as much as the weakness of sentimentalism as we enter upon in this and other chapters the formal consideration of an American scheme of procedure.

It will serve a useful preliminary purpose to point out and briefly discuss the several "systems" known to the English-speaking world, viz: (1) the old common-law pleading of England; (2) the English Common Law Practice Act of 1873; (3) common-law pleading as modified by statutes, and (4) an arbitrary legislative codification of rules of procedure bearing the pseudonym of "code pleading."

John B. Minor, of the University of Virginia (4th Minor, 3rd Ed., p. 699) gives an interesting history of the old common-law pleading. *It owes its development to the avarice of clerks.* Said Mr. Minor: "It appears from Glanvil(1187) and from Bracton(1263) that during the reigns of Henry II (from 1154 to 1189), of Richard I (from 1189 to 1199), of John (from 1199 to 1216) and of Henry III (from 1216 to 1272) very little order or science prevailed in the practice of pleading. But in the time of Edward I (1272 to 1307) there seems to have been a sudden and marked advance. From a record cited by Mr. Reeves of 21 Edward I (1293), we find the *narratio* or declaration drawn with form and precision, and liable to be excepted to if deficient in either of those qualities (2 Reeves' Hist. of the Eng. Law, pp. 264, 266); and the year-books of Edward II's time prove not only that the fundamental principles of pleading had become well established, but that many of its more subtle and artificial rules were beginning to be observed [St. Pl. (Tyler) Appendix xxxvi and C. N. 38]. And the systems thenceforward continued to advance until the reigns of Henry VI (A. D. 1422 to 1461) and Edward IV (1461 to 1483), when it was cultivated with such industry and success as to raise it to a sudden perfection in

a few years" [3 Reeves' Hist. Eng. Law, 424]. It was at this date that Littleton praised the common-law procedure in his "Tenures," and upon which Coke so favorably commented. It is much doubted if they would have done so at a later period. This is a distinction not drawn by many thoughtful advocates of that anachronism eventually inherited in America through Mr. Stephens' second book, published in 1828. Mr. Minor calls attention to the conflict between Reeves and Coke, the latter assigning its highest perfection to the reign of Edward III (1327 to 1377), and quotes Sir Matthew Hale in support [Hale's Hist. Com. Law, 212]. "Coke said of Edward III," quotes Mr. Minor, "that pleadings grew to perfection without *lameness* and *curiosity*."

What follows should be memorized by every common-law partizan. We are going to honor these pages by permitting Virginia's great law teacher and common-law scholar to set forth in his own inimitable way *how common-law pleading lost its usefulness and became a menace* [Ib., p. 680]. "And Lord Hale observes that, though pleadings in the time of Henry VI, Edward IV and Henry VII (1422 to 1509) were far shorter than afterwards, especially after Henry VIII (1509 to 1547), yet they were much longer than in the time of Edward III; and the pleaders, yea, and the

judges, too, became somewhat *too curious* therein; so that art or dexterity of pleading, which in its use, nature and design was only to *render the fact plain and intelligible and to bring the matter to judgment with a convenient certainty*, began to degenerate from its primitive simplicity and the true use and end thereof and to become a piece of *nicety and curiosity* [Hale's Hist. Co. Law, 212]. And Lord Hale accounts for this needless length and nicety, in part, by the fact *that the pleadings were mostly drawn by clerks who were paid in proportion to their length and, therefore, took care not to study brevity*" [Hale's Hist. Com. Law, 213].

So astounding was the delay that it is not surprising to find the dawn of the nineteenth century ushering in a decided propaganda against so outrageous an interference with and useless tax upon justice which was the creature of the avarice of clerks. It is logical that the trend of the English mind should be away from conflicting legislation and unrelated regulations and towards judicial science and correlated rules. It is true to English traditional faithfulness to a cause and legislative apathy that the people pursued an obstinate Parliament for nigh on to half a century until a final, complete and splendid victory was won. And yet as we shall soon see, the English were merely

returning to their own first principles in setting their Supreme Court free to make rules. This great reform revolved around one man until Lord Selborne took up the leadership, and his biography is largely the history of court rules in England.

Henry John Stephen, who has often been mistakenly called the Apostle of Common-law Practice, wrote his first book in 1824 as a sort of explanation and apology for existing conditions. The second edition followed in 1827. "It was," said he, "intended for the use rather of those who are exploring the principles than of those who are engaged in the practice of pleading." Yet this is the book now used as a text in the common-law States. It was Mr. Stephen's last attention to common-law practice for Parliament in 1828 made him a member of a commission to reform procedure. His report in 1833 in favor of court rules partially became a law in 1834 [3 and 4 Will. IV, ch. 42, 5, 3], and there followed the "Hilary Rules" of that year. His next book, in 1835, incorporated this change and the "Uniform Process Act" of 1832 [2 Will. IV, ch. 39, S. I. Jenks' Eng. Law, 350]. As the rule system broadened under his guidance he wrote new editions in 1838, 1843 and 1860. Inasmuch as the Acts of 1850 [13 and 14 Vic., ch. 16], 1852, 1854 and 1860 incorporated all others

and broadened them and continued in force until 1873, when the Selborne "Judicature Act" was passed, no other edition appeared and, after that Act, none other was necessary. This Act completely reorganized the courts and took wholly from Parliament and vested in the Supreme Court the power to regulate the pleading and procedure of the *nisi prius* courts, a brief explanation of which will soon follow [Tyler's Pref. to Stephen].

We said that in these things England was but returning to first principles. It is known that there were Chancery Orders as far back as 1388, and Common Law Rules in 1457, and these referred to still older rules apparently lost. The oldest published King's Bench Rules appear to be of 1604. The oldest Exchequer Rules seem to date from 1571, issued by the Lord of the Privy Seal. There were other Exchequer orders, undated, published in 1698 [Jenks, 189, 351]. While we shall presently cite some practical contemporaneous observations by Samuel Rosenbaum, Esq., of the Philadelphia Bar, there is now given a brief synopsis of the Selborne system [Acts 1873, Vol. 2, 2nd Ed. Enc. Law of Eng.].

(1) Forms of action were abolished \* \* \*  
He is now allowed to state the facts on which he relies, and the court will grant him the remedy to which on these facts he is entitled.

(2) Each party must now state facts and not conclusions of law. He was bound, before 1875, to set out with reasonable precision the points which he intended to raise; but this he generally did by stating not the facts which he meant to prove, but the conclusion of law which he sought to draw from them. His opponent thus learned that he desired to prove some set of facts which would sustain a given legal conclusion; but how he proposed to sustain that legal conclusion was not disclosed. For instance, there was a very common form of declaration: "For money received by the defendant to the use of the plaintiff." A claim in that form might be established by some six or seven entirely different sets of facts, and it could not be ascertained from the plaintiff's pleading which set of facts would be set up at the trial to show that the particular money claimed was received to the use of the plaintiff. Now the plaintiff must plead the facts on which he proposes to rely. \* \* \*

(3) "So, too, with the defense. 'The general issue' is abolished. In an action for goods sold and delivered the defendant was formerly allowed to plead that he 'never was indebted as alleged.' This is a conclusion of law, and at the trial it was open to him to give in evidence under this plea any one or more of several totally different defenses, *e. g.*, that he

never ordered goods; that they never were delivered to him; that they were not of the quality ordered; that they were sold on a credit which had not expired at the time that the action was commenced; or that the statute of frauds had not been complied with. Now a mere denial of the debt is inadmissible. So in an action for money received to the use of the plaintiff, the defendant must either deny the receipt of the money, or the existence of those facts which are alleged to make such receipt to the use of the plaintiff.

"So in actions of tort, the defendant was formerly allowed to plead 'the general issue' 'Not guilty.' Under that plea it was open to him at the trial to raise several distinct defenses. Thus the defendant in an action of libel or slander by one short and convenient plea of 'not guilty' simultaneously denied the publication of the words complained of, denied that he published them in the defamatory sense imputed by the innuendo, or in any defamatory or actionable sense which the words themselves imported asserted that the occasion was privileged, and also denied that the words were spoken of the plaintiff in the way of his profession or trade, whenever they were alleged to have been so spoken. But now this compendium mode of pleading is abolished. 'Not guilty' can no longer be pleaded in a



civil action. The defendant must deal specifically with every allegation of which he does not admit the truth.

(4) "Demurrers were abolished. It is true that either party is still allowed to place on record an objection in point of law, which is very similar to the former demurrer. But there is this important difference. The party demurring could formerly insist on having his demurrer separately argued, which caused delay. But now such points of law are argued at the trial of the action. It is only by consent of the parties or by order of the court or a judge that the party objecting can have the point set down for argument and disposed of before the trial. And, as a rule, such an order will only be made where the decision of the point of law will practically render any trial of the action unnecessary.

(5) "Pleas in abatement were abolished. If either party desired to add or strike out a party, he must apply by summons. No cause or matter now 'shall be defeated by reason of the misjoinder or non-joinder of parties.'

(6) "Payment into court was for the first time allowed generally in all actions.

(8) "The right of set-off was reserved unchanged; but a very large power was given to a defendant to counter-claim. He can raise any kind of cross-claim against the plaintiff;

and in some cases even against the plaintiff with others, subject only to the power of a master or judge, to order the claim and cross-claim to be tried separately if they cannot conveniently be tried together.

(9) "The names of the principal pleadings were changed. A statement of claim takes the place of the former *declaration*. Instead of *pleas*, the defendant now delivers a defense, or it may be a defense and counter-claim. The *replication* is now called a reply" [pp. 161-2-3].

Some States have taken the common-law pleading as a basis and made statutory alterations and additions, as did the State of Virginia, which is the third system. It is manifest that any merit which this statutory modification scheme might possess is wholly neutralized by the fallibility of political legislation and the absence of scientific judicial direction, necessary to correlation. Its objections are much the same as those applying to "Code Practice," which presents grounds for double apprehension. Bereft absolutely of principles, customs, forms, traditions and precedents, we find it *wholly* dependent upon legislative whim. With all due respect for the many earnest, honest and well-equipped men who compose those bodies, between want of preparedness and indifference, there is

much to be feared. Among other things, is the power aggravated by the habit of legislative change. We have endeavored and will further show, by what history has written, that there is a great deal more in pleading than mere form, and that it is the first agency of government attacked by the enemies of liberty. A suspended habeas corpus is the winding sheet of civil liberty. The power that controls the pleading and procedure of the courts is responsible for the spirit of liberty of a country and the appreciation of equal opportunity. Therefore, pleading and procedure ought to be a science beyond the limitations of the average legislator.

Let us analyze these principles in the light of history. Wherever groups of men have their homes in the world there must be some restraint, for law is inherent in society. It is the manner of the application of that restraint, and not the restraint itself, with which we are now concerned. There are three methods, the respective elements of which are *reason*, *duress* and *superstition*. They translate the spirit of organized society in its highest and its lowest conception of citizenship, wherein may be observed a national as well as individual character. The administration of law through reason denotes equality and a developed sense of justice under the guidance of

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a high order of intelligence. Duress connotes subjection to a recognized power over a weakened will and the absence of individual initiative and importance. Superstition attributes unintelligible power to certain human and natural agencies and reflects unreasoning dread of the supernatural. There is no conception of citizenship and no measure of either personal right or duty. The processes of administering law under the three classes differ as widely as the character of the people concerned and improve in definite proportion to their spiritual and mental advancement.

The governmental restraint of reason, portrayed in the modern judgment, translates the mature wisdom of the judge based upon facts deduced within the limitations of a mandatory record in the light of an appropriate body of law, composed of statutes and accepted precedents. In this program there is reflected the application of trained intellects, the intelligence of an advanced civilization and the individual restraint of patriotism and self-respect. The degree of necessary submission is but an unselfish, patriotic, voluntary surrender of certain personal rights in the interest of the general welfare. It is a practical application of the elements of religion. A transgression of this principle is the exception that marks the criminal in society. The "Themis-

tes" of the Greeks, founded upon the superstition of the primitive condition of mankind in the infancy of the race that they were "divinely dictated to the King" are not wholly extinct [The Iliad; Maine, Ancient Law, 8]. This is restraint through superstition, a condition precedent to which is ignorance of political science or the absence of a sense of self-esteem and equal opportunity. Mr. Maine said: "It is, of course, extremely difficult for us to realize a view so far removed from us in point both of time and association, but it will become more credible when we dwell more at length on the constitution of ancient society in which every man, living during the greater part of his life under the patriarchal despotism, was practically controlled in all his actions by a regimen not of law but of caprice."

This Homeric period of heroic kingship depended as much upon "the possession of supereminent strength, courage and wisdom" in the King as upon the superstition of "divinely given prerogative" [Maine, p. 9]. So long as the co-ordination continued, the dynasty lasted. "Gradually," said Mr. Maine, citing Grote, whose "History" antedated his own work by a few years, "as the impression of the monarch's sacredness became weakened, *and feeble members occurred* in the series of hereditary kings, the royal power decayed, and

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at last gave way to the dominion of "aristocracies." Homer repeatedly describes these "oligarchies," and they present nothing unnatural. In the presence of that vast volume of enforced ignorance and spiritual lethargy the few favored with educational advantages and possessing the faculty of initiative reasoning obviously cohered in the effort to perpetuate some form of government in self-interest. Homer speaks of a "Council of Chiefs." But it was a response to awakening reason that these were, in the course of time, joined by others who ascended by sheer force of character from the proletariat. Thus generations of gradually subsiding internecine strife, official oppression and dishonesty marked the sure advance of an awakened but slowly developing spirit of real manhood. Eventually right and not might or mystery or superstition, became the measure of civil liberty and of property rights, which *is the living spirit of the courts*. The philosophical student will not be unmindful that there was always government, but there was no human advancement, no equal opportunity and no spiritual development until a new order of things ushered in strong, independent courts. So it is seen that in the judicature of superstition as in the judicature of duress there was no ad-

jective law and the pleasure of the prince was the law of the land.

This was the earliest notion of jural conception in primitive man under a social compact such as existed in Homeric Greece. A satisfying description of the evolution from the age of the heroic kings to the England of the first half of the nineteenth century may be found in Grote's *History* [Pt. 2, ch. 9] and Maine's *Ancient Law* (pp. 9-12). Contemporaneous with the advance of civilization and the restraint of reason was an appreciation of the science of adjective law as a distinct element. That is the purpose of briefly referring to history, and particularly to the *Iliad*. It served a purpose to set in opposition the judicature of England and America to that of Homeric Greece. Indeed, may there not be deduced an explanation of Russia's difficulties following the deposing of her Czar. While restraining those indiscreet passions that have ever cursed all society, and are now sorely aggravated in Russia, it is well to bear in mind that a resurrected proletariat, yet dead to the transcendent spirit of the courts, calls for gentle patience of the philanthropist instead of the cruel steel of the executioner. It is the traitor only that should receive harsh treatment. Lest the new citizenship despair, let their eyes, by way of contrast, be first turned upon the

English of James II and then upon that noble race of today. Let them consider Thackeray's post-Cromwellian period and Milton's satire of her Bar, for then they may cheerfully and hopefully dwell upon a manhood developed and ripened by the spirit of the courts wherein matured the common law and *the one great nation without a code*. If Englishmen are typically a race of deliberate thinkers instead of scintillating wits, they do justice to the national notion of jural conception and a profound body of law that enables liberty to enlighten the world. It is founded in reason, wisdom and social necessity and upon a recognized self-esteem and not upon legislative fecundity. National and individual retrogression in these sacred elements is always coexistent with Homer's "Heroic Kingship." Modernity is just now witnessing its most exaggerated national type from which a thoughtful German people will eventually be freed.



## CHAPTER IV.

THE RELATION OF JUDICIAL PROCEDURE TO  
GOVERNMENT.

If judicial procedure has been the cause of more discussion and dissension and is prolific of more dissatisfaction in governmental relations than any other one subject except religion, it is because it is the most vital and least understood and appreciated, as we have endeavored to show. Some sound lawyers fail to distinguish between the substantive and the adjective law, as it were, between the contents of the reservoir and the pipes through which it is conveyed to the people. History is silent regarding the procedure in the trial of Cain, but in Ecclesiastes (8-11) there is most faithfully commemorated the protest of the ancient Hebrews: "Because sentence against evil work is not executed speedily, therefore the heart of the sons of men is fully set in them to do evil." The Medes and Persians appear to have made it a little unfortunate for one to question the immutability of their laws, and so did the administrators of the Roman Republic with its Twelve Tables. In them we are not interested, however, since their governmental policies would hardly be welcomed by the ideal Amer-

ican Republic. But the habit was again acquired under the Cæsars, and grew in profusion and boldness until the days of the Emperor Valentinian III, who, as has been stated, ordered that the opinions of no one should be considered except those of five citizens named by himself. The great Justinian Code will forever be the distinguishing feature of the first half of the sixth century of the Christian era. Napoleon boasted that when his famous battles were forgotten his Code would perpetuate his memory. Wars are temporary, but judicial procedure is like the poor and touches all elements of society. Associated with English law and procedure are the immortal inns of court, organized for its study and consideration. They might profitably prove an inspiration to the young American. When Lord Selborne and his associates perfected for England her present model system of practice, there ended eight centuries of controversy and a new era of judicature was born to the world. The struggle, at last, seems to be over. There is not now, nor was there ever a system to compare with it in form or result. He did not, like Moses, seem to have found it; nor, like Mr. Field, to have invented a system. It is an evolution of the great common law of England modified to suit the times, and is the result of the mature

reason and experience of centuries. Parliament promptly sanctioned it and the Supreme Court of Judicature put it into effect with all necessary rules of practice. Some day Congress will put its political ear to the ground, stop its patchwork policy and follow a good example. A waning of popular confidence must be strengthened, and there is no better way offered.

The psychology of the situation may be helpful, if not interesting. Since judicial procedure is dealt with by specialists, the view of it is naturally personal. Unlike the substantive law, where men differ in groups and even in political parties, almost every thoughtful lawyer has an inchoate, individual idea gradually progressing into a plan which in the fullness of time will be offered as a remedy. Therein they do not materially differ from men suffering from physical ailments. Most every thoughtful lawyer admits that procedure is unnecessarily cumbersome and expensive and devoid of science and correlation; that reform and uniformity is needed and must be brought about. Much of one's time is lost in wondering why it is not done. One reason, I venture to say, has been given. The situation of the lawyers at present is very much like that of a group of workmen who dug into a swarm of hornets—it is every man

for himself and the devil take the work. Lawyers are too busy avoiding the sting of technicalities of pleading to obliterate the source of the evil, for some time must be given to the study of substantive law. The first thing in mind upon entering a case is the pleading and procedure, and it is also the last, without any intermission in the meantime. Practically it is like crossing an out-of-date bridge in bad repair and with patched decking. The burden-bearer must minimize his load in order to apply his energy to getting over the pitfalls in the defective way. His skill, strength and speed serve him and his employer little purpose. The bridge ought to be destroyed and a modern, complete viaduct erected, suitable to the times and the traffic. In all of which it is meant to imply that the State is recalcitrant in one of its most sacred duties in not leaving the entire matter to the Supreme Court, whose conclusion would be accepted by citizens, lawyers, legislators and judges.

Where does the blame lie? The great Chief Justice himself could not make satisfactory progress under present judicial procedure. Lawyers and legislatures and Congress and commerce and society must take the beam out of their own eye before their criticism of the courts can be equitably heard. As a lawyer, I

lay the chief blame at the door of the profession. Once accustomed to a system, to lawyers it becomes a fetish. Their answers to the call of reform were: "We are accustomed to the system in vogue," or "we can't agree on one," or "Congress cannot trust the Supreme Court." And we keep on patching. I challenge the legal fraternity to bring up from the bottom of their hearts a different answer and to deny that the responsibility is theirs. Eight years ago I ventured to say that commerce and society, in necessary ignorance of what to do, were growing restless and impatient, and unless there be relief, and speedy relief, it portended evil. It came in the shape of the recall of judges and judicial decisions, also other expediences. By his works, a lawyer should evidence a keen perception of his duty as an officer of the court and so participate in its machinery as to nurture that public confidence necessary to the usefulness of the courts. The prediction made at the same time that commerce and society would rush to their support if they would raise a standard and unite under it has been fully vindicated. The loyalty of the great mass of the people, once convinced of the good intentions of government, is the most indestructible, comforting and dependable thing next to religion. I had rather possess the abiding faith of a peo-

ple than all the wealth of Rockefeller and Morgan. But if the lawyers do not agree and lead the way, how can Congress and the people be expected to follow and the State perform its duty? When that sentiment becomes a fixed conviction in the hearts of lawyers the Republic will be safe. There are certain duties to society that none but lawyers can perform. This thought is developed in another chapter.

Tried and proved honesty has become to be the greatest political asset in the United States. This exception to what ought to be a rule does not reflect a healthful state of the public mind. Restlessness is running away with better judgment. Courts draw their power and have their being in the faith and confidence of men and not by virtue of constitutions and statutes. Judicial procedure is made possible by the trinity of respect, faith and obedience. Weaken any one of them, and their usefulness is impaired. Totally destroy any one of them and the Republic will fall. Of the trinity of which the Federal government is composed, the administrative and legislative functions could not survive without the judicial. With faith in the judiciary, the other two can create but temporary apprehension. How hopefully do we turn to the courts as a city of refuge from all evil. And it is our last hope.

An outspoken impatience if not severe condemnation, then, is well justified in the contemplation of efforts to undermine popular faith and trust in the courts, and the Federal Supreme Court in particular. The founders of the government placed the Supreme Court beyond the influence of its two co-ordinate branches. Under the Federal plan it is the burden-bearer, for it is the guardian of the Constitution of the United States, their treaties and their laws. Congress can enact and the Chief Executive may approve, but the act must square with the Constitution that the court must read into it. The law, therefore, is found in the decisions, and it is thereby made certain, permanent and uniform—a fixture resting upon eternal principle. The very structure of interstate relations is the evolution of wise judicial decisions and not statutes. It is the foundation of the reputation of John Marshall. And I make bold again to predict that the interpretations of a new interstate industrial era are going to prove the foundation of other great judicial reputations. The country is moving on behind its faithful guardian, and it is moving on in the middle of the road laid out for it by its founders. Times and the manner of doing things may change, but principles live forever. That is the secret of the strength of this Republic.

No storm can sway it from its course, for there is a resolute pilot at the helm. The Supreme Court nurtured the nation in its infancy, trained it in its youth and is now guiding it in the straight and narrow way, in its maturity. It has been to the nation a pillar of fire by night. It has guided destructive revolutionary doctrines into beneficial evolutions. The violence of anarchy and the persuasiveness of the demagogue have fitted themselves into the constitutional mold. The oppression of concentrated power and the chicanery of corrupt organization have ceased to trouble and alarm at its simple word. It is the final arbiter between man and his brother, the state and the church, the citizen and the soldier, and even between Congress and the Chief Executive himself. Who will measure the debt of the country to its highest court? And, as has been said in another place, there abides in the people of this country a sublime faith in their highest tribunal and in most all of their courts that makes of submission the noblest attribute of national character. This faith is the cornerstone upon which rests the very existence of the Republic. It is as beautiful as filial bondage and stronger than the duress of arms. Believing these things, is there a more patriotic duty in the noble profession of the law than the profound obligation to encourage,



foster and make justifiable that faith in the judiciary of this country that is the very breath of its life? With that thought, let us take an intimate view of some features of the courts as a machine for administering the law.

Witness some rules of conduct that Congress has thought necessary in order to hedge about and regulate the conscience and discretion of the Federal judges whose appointments the Senate has approved. And much of the Federal practice, as we have shown, may now be regulated by the individual judge. Under one statute [29 Stat. at L., 184] it is solemnly provided that "no marshal or deputy marshal, attorney or assistant district attorney, jury commissioner, clerk of marshal; no bailiff, crier, juror, janitor of building, nor any civil or military employee of the government and no clerk or employee of any United States justice or judge shall be appointed United States commissioner or receiver of the court." But the amazing precaution is [Sec. 7 of 25 Stat. at L., 437] "that no person related to any justice or judge of any court of the United States by affinity or consanguinity within the degree of first cousin shall hereafter be appointed by such court or judge to, or employed by such court or judge in any office or duty in any court of which such justice or judge may be a member."

What sort of a commentary is this upon the *personnel* of the Federal judiciary? What story will it justify to the future historian who will judge a twentieth-century sense of ethics by its prohibitory statutes? Are there many, or just two or three men whose sense of duty needs to be statutory? How did they become judges and how do they remain on the bench? For the sake of the respect the bar bears to the great men who honor the bench in the highest and purest service to their country, let these malefactors, if any there be, be swept from the bench they dishonor and these statutes erased from the memory of the men they insult. A judge who has to be legislated into a proper selection of receivers, or any other official or personal act, is unfit to appoint custodians to administer the assets of litigants or to fix their compensation. Such a man would do indirectly what he is forbidden to do directly. Statutes do not make morals. A judge ought to and must be like Cæsar's wife. If Congress has no faith in its own creatures, by what course of reasoning does it reach the conclusion that the people will have any? A statutory guardianship is the very antithesis of high ethical standards and is suggestive of a suspicion that has no place in jurisprudence. Life tenure is to be as much approved as the "recall" is to be disapproved, but there ought

to be a simpler, cheaper, more direct and more certain way of preferring and answering charges concerning judicial conduct, that the tenure of improper persons may be speedily, even abruptly ended. Impeachment should be made to fit the crime instead of being the plaything of politics, and it should not be the only way of bringing a life-tenure judge to judgment, as was suggested in the first chapter.

A cause for dismissal from the Army and Navy is "conduct unbecoming an officer and a gentleman." Upon the slightest suspicion an officer does not wait for a trial, but calls for a "court of inquiry." Would that a judge could do the same. It was suggested that a tribunal and procedure be provided for the informal trial of complaints and charges against judges, the prototype of which may be found in military law. Before a court such as was suggested in the first chapter there could be defined and considered the trinity of evils—corruption, ignorance and subserviency—for conduct could be analyzed and motives exposed. Such a tribunal, while it could not impeach, the people would trust, and would be all-sufficient, because the judge is brought within their reach. The chances are that such a Federal plan would be adopted by the States when its merit was once evidenced. It would

do more towards elevating and maintaining judicial and legal standards and reviving the necessary spontaneous popular admiration and respect for the courts than any other possible precaution that could be taken. The evil sought to be prevented lies too deep to be reached by a statute or a Congressional trial. The heroic remedy of turning on the local light is necessary. It would do more than any other agency towards subduing the demand for the dangerous expediency of the "recall of judges." This demand can nearly always be traced directly to some improper *personal* judicial conduct that could not be or has not been reached by impeachment. The present attitude seems to be that, if the machinery of the law will not allow us to reach a judge, then we will fix it so he can be *mobbed*. Congress, by refusing to impeach in proper cases, sowed the wind and is now reaping the whirlwind. More prevention and less cure is needed. Dissatisfaction with judges is not the outgrowth of honest decisions or big matters, because the average man is a good loser when he has had a fair chance, but it is on account of the aggregation of little things of which the press never hears and under which the sufferer chafes in helpless impotency. And it should be remembered that the people only see results, not being familiar

with the science of court procedure. They do not understand that the means used are contrary to both morals and ethics and are secretly despised by an outraged but helpless bar, and so they condemn all judicial procedure, judges and lawyers. Once it is known that there is a tribunal before which both complaints and charges may be preferred, the matter will become personal to and at the command of every citizen and lawyer as well, upon properly authenticated charges presented through the Supreme Court. It is repeated that this is believed to be the one thing that will defeat the sporadic demand for the dangerous expediency of the recall of judges.

If these Federal statutes, creating statutory ethics and morals, mean anything it is an absence of a proper selection of the personnel, for which reason we have been led to suggest in another place a more efficacious mode of selecting Federal judges. It will be helpful to remember that England may trace the elements of her greatness in her Magna Charta. "The courts no longer followed the person of the King; but they were held in certain places." No judge could be appointed "excepting such as knew the laws of the land and were well disposed to observe them." Since then, in the courts lay her power; in

reverence she found her strength, and the people their contentment and happiness. The people were required to fit the law, and not the law the people.

## CHAPTER V.

THE RELATION OF COMMERCE TO THE COURTS  
—ITS CALL TO SERVICE.

We have been considering the relation of judicial procedure to the government, to the judge and to the people. Let us now observe its meaning to the commercial lawyer by way of a special appeal to that influential branch of the profession. No group of men are so peculiarly fitted by nature, environment and daily professional activity to understand and to appreciate the need of a court procedure that aids instead of obstructing the course of justice as are commercial lawyers. No set of men could personally feel so acutely as do their clients the disappointing thrust of the keen blade of subtlety into the vitals of justice. Montesquieu's practical idea of distinct commercial courts has been advocated in this book. Many lawyers have patiently prepared themselves for the specialty of commercial law, but their usefulness is limited by the machinery of the court, wherein the metaphor of the soldier can be made to serve a useful purpose. What matter the perfection of ammunition and the accuracy of aim if his rifle be rusted, its sight obscured by cobwebs and the sol-

dier sunken to his nose in the scrap heap of the refuse of antiquity and the playthings of legislatures and Congress? Indeed, what does a lawyer's equipment and resourcefulness profit him or his client if his limitations are prescribed by Congress and the legislatures?

This practical analogy is presented as being illustrative of the effect of the present legislative policy towards judges and lawyers. And it is useful to say at this juncture that judges and lawyers stand or fall together. Their destiny and standard is the same. This would be, though judges were not selected from the ranks of the lawyers. It is inherent in the scheme of judicature. Their history is inseparable. When they co-operate and co-ordinate, success follows; when they are unsympathetic or are interfered with by outside agencies there is mediocrity or failure. Yet, as has been shown, Congress and almost all the legislatures have been leading the judiciary department about by the hand, if, indeed, it has not put it back into swaddling clothes. Its baleful influence has discouraged many thoughtful men. It may well be emphasized that there inheres in the courts the power of self-preservation, and that the conduct and advancement of the detail machinery is a vital element. It is common sense and not political science, and that is the paramount thought



of this chapter. True it is that it required legislation to create the courts and to define their authority and jurisdiction, because of the inconvenience of such detail in a constitution, but it is inconceivable that either the Congress or the Chief Executive should retain a hold of any kind upon them or exercise any power *over the manner* in which they must go about the performance of their sacred functions. That, in a sentence, is the trouble. Upon it the two great political parties of to-day agree, and it has recently been an intense gratification to see their respective leaders and spokesmen stand side by side before the Committee on Judiciary of the House of Representatives in advocacy of the plan to which this book is dedicated.

These principles may be practically illustrated. A board of directors of a corporation might as well supply a railroad, a locomotive and a schedule, and then try to tell the engineer how to operate his big machine over the line. It is not meant that they will occupy the cab with him, but that a system of iron-bound instructions will be supplied him. There is not a legislator but what would call that very silly, if not criminal. Deprived of all sense of responsibility, unable to exercise any discretion or judgment, the driver's only power and duty would be to follow the rigid

rules, to pull a lever here or to open a valve there. Although he observes the train leaving the track or the locomotive ready to explode, he must follow the impractical rules of the board of directors. It follows that his passengers would charge him with being an idiot or a criminal, and few would inquire to find the real seat of the trouble.

Let that metaphor sink deep into your minds, and then let it be carried a little further. One will not be unmindful that these regulations were prepared for the operation of the tiny locomotives of more than half a century ago, before this country had the faintest conception of the giant in commerce it has become and when it was not of a mind to appreciate or understand the close relations that now weld the States into one commercial whole. The legislative amendments engrafted upon these regulations and instructions confound instead of clarify. It is a serious thing to say, but it is a manifest fact that nothing but the personality of individuals—enough judges and lawyers possessing the people's confidence — has saved the American bench and bar. *There have been enough big, strong and pure men connected with American jurisprudence to retain the respect of the people in spite of the patent defects in procedure and the waste of assets of litigants in prodigal hands, officially*

condemned by former President Taft. Lest there remain a lingering doubt, let there be quoted the words of that great conservative, Hon. Elihu Root, fully endorsed by Judge Alton B. Parker, who was standing by him at the time. Said he:

"When we make a statutory right the judges have got to observe it just as much as they have the original right founded on common justice. If they ignore it, there is a reversal, and so the man who has but little means to employ lawyers, the man who has but little time to take from earning his livelihood becomes discouraged and sometimes ruined, and the men who have abundant means to employ lawyers can secure immunity against being brought to justice upon the demands of the poorer and humbler litigants. A race of acute, adroit code lawyers has grown up. You will find men in any of the great States where this system prevails, where the legislature has been interfering with the practice, who will undertake for reasonable compensation to delay any case indefinitely; and as a rule they can do it. The reason is that our legislatures have built up a great system of technical procedure, creating statutory rights, which prevent the courts from doing justice."

But let us go a little deeper than the superficial troubles of inconvenience and expense, for they are but symptoms of the disease. We are a thinking people, a reading people and a philosophical people. It is indelibly written upon the pages of history, as has already been briefly shown, that interference with the judiciary, or a mingling of the three governmental divisions, spells governmental inefficiency. It promotes a lively dissatisfaction that manifests itself among the people in no fixed way because of the deep-rooted nature

of the trouble. Let history take us back to the day of James II, when England was struggling with her infant jurisprudence; when Parliament was prorogued at the pleasure of the King and a specially appointed judge interpreted the law and made possible a Jeffries. It will be remembered that it was James II who declared that "I am determined to have twelve lawyers for judges who will be all of my mind to this matter." That is an example of the recall of judges and judicial decisions that it is well to bear in mind. And when one looks about and sees a respectable citizen in the person of ex-President Roosevelt, with a respectable following, threatening to overthrow all judges whose opinions are not to his liking, one finds justification in believing that we have barely escaped a James II in free America. The "bloody assizes" connoted an inherent love of constituted authority, a distinguishing feature of the Anglo-Saxon people manifesting itself in those semi-barbaric days. The people resented interference with the fixed program of government, that Americans call the Constitution, to which they had agreed to become subject, and they fought for the integrity of the three divisions of government. That a departure from it in this country has already weakened the influence and standing of the courts and lawyers is evi-

denced by an undefined restlessness and by a system of court procedure that is the curse of commerce and the jest of the civilized world. Attention has already been directed to the superstition of the primitive days of the heroic kings of Homeric Greece and the tyranny made possible by an inadequate civil law procedure. Our civilization boasts of having advanced from these abuses. Is this advance due to a perfected judicature or to the high sense of ethics and morals *with which America started?* Let us stop and think!

Unquestioned American *symptoms* of decadence are the subsidence of the patriotic spirit of submission reflected in the recall of judges and of judicial decisions and the erection by business men of private arbitration commissions and "trades courts" as necessary substitutes. Unquestioned *results* are a dissimilarity of the procedure of the courts; the lack of uniformity in decision in the interpretation of the same statute; an absence of co-ordination between the bench and bar and the presence of a critical attitude between them; unnecessary expense and delay in litigation; a technical, subtle procedure and practice in the courts that serves to confuse rather than to clarify the issue to be tried; a truculent and vain but growing tendency to lay more emphasis upon the pleading and procedure than

upon the issue joined; and the legislative elimination of the lawyer and judge almost entirely in the preparation and improvement of court procedure. It is repeated that the courts that were established for the use of commerce and society have become the fencing schools of highly trained pleaders. The business man pays the expense and departs in bewilderment, disappointment and disgust. Americans are standing exactly in the shoes of the Englishmen of 1820, as we have historically shown. Where is the boasted pride of advancement and the dynamic American spirit? It is not doing its duty to the courts and must soon reap the inevitable harvest. The most difficult duty any lawyer ever has, therefore, is to explain this status to his client, which is one of the main objects of this book. These things are mute witnesses supporting the allegation that Congress and the legislatures have made a serious mistake in their policy of tying the hands of the Supreme Court, and that the time for a new order of things has arrived.

But let us consider further the practical side to this question. What of the clients—that prosaic multitude of men who go directly at things, who despise technicality and expect results and who make up the personnel of commerce. Their ideal of justice is the blind

goddess holding in her hand the brightly bur-nished and perfectly balanced scales, instead of the rusted and patched instrument thrown into the scrap heap by England much more than half a century ago; or, else, the stiff and clumsy invention of Judge Field, introduced clumsy invention of Mr. Field, and introduced into New York in 1848, altered and tampered of a curse than an adjunct of jurisprudence. If one were asked to furnish an explanation to indignant and mystified clients for delay, expense and uncertainty, a sculptor would be engaged as one best prepared. The blind and benign goddess transformed into an amazed and indignant woman holding in one hand her blindfold and in the other, upon which she gazes in contempt, the web-covered, rust-marked stilliards of the days when common-law pleading was in the height of its malignant power. Her thoughts might, alas, be those of Milton, that "Most men are allured to the *trade* of law, not grounding their purposes on the prudent and heavenly contemplation of justice and equity which was never taught them, but on the promising and pleasing thoughts of litigious terms, fat contentions and flowing fees." This allegorical figure would be completed with the aid of Shakespeare, for there would be lurking about the feet of this twentieth-century American fig-

ure of justice the images of the miserable witches that fevered the brain of Macbeth and made him protest:

“And be these juggling fiends no more believed,  
That palter with us in a double sense;  
That hold the word of promise to our ear,  
And break it to our hope.”

And as it was in the time when the blind poet sang his deathless songs of human nature and the conflict of human emotions and relations, so it is today. The world is simply a little older. The lawyer and the judge is the vicarious sacrifice upon the altar of public condemnation and criticism. The solution lies in the existence of a spirit sufficient to protect their self-respect. There is no mediocrity, for lawyers will always be leaders in directing the social compact or, else, the despised of society. The people, untrained in the niceties of the law, the highly technical nature of the detail machinery of the courts and necessarily ignorant of the fact that Congress and the legislatures are wholly responsible for its creation and continued existence, naturally strike at the immediate objects which apparently occasion their discomfort and financial loss. And this is the reason that the lawyers and the judges are condemned for every juridical fault. In the very nature of things laymen do not know and can-



not know, until properly informed, that Congress and the legislatures have assumed to dictate to the judges and to the lawyers the exact manner in which they shall act in court, it matters not how technical and delicate the duty, or that in its execution the highest discretion and ability and preparedness are demanded. That is to say, should the trial judge, in order to prevent a miscarriage of justice occurring in his sight, depart in the least from the rigid, statutory regimen laid down by an all-wise Congress or legislature, an exception would be noted, the case would be appealed and the judgment reversed on that technicality. How can a judge or a lawyer respond to the highest and best impulses of his nature under these circumstances? *A splendid compliment to the sterling character of the lawyer and judge is the fact that the profession has withstood the evil of this blight.* In other words, the legislative department not only tells the courts what they shall do, which is proper, but it undertakes to tell them how to do it, which is a governmental crime. The lawyer is thereby forced at times to interrupt justice instead of aiding it.

But, instead of being resentful, let us reason together. Business men logically look to lawyers as experts to keep perfect and modern the instrumentalities with which they labor.

Commerce listens with just impatience to the excuse that Congress and the legislatures have tied the hands of lawyers and judges and that they are forced to use that which is given them, for that is but a pitiable confession of weakness that should bring the blush of shame to the lawyer's cheek, truth though it is. This is no time for apologies; it is a time for fighting for the opportunity to perform a sacred duty upon which the maintenance of their self-respect depends. Let the lawyers awake to a full realization of the profound responsibilities of the noble calling of the law. That can be met by no other human agency. The world looks upon the lawyer as a leader, as the maker of public sentiment, and not as an apologist or a suppliant mendicant at the door of Congress. Upon what sort of food have our lawyers been nourished, that they should come seeking alms of Congress instead of demanding historic rights! They must go to the people for support if relief be not promptly and ungrudgingly forthcoming. This is said with the deep conviction that it is a profound governmental policy resting solely in the keeping of lawyers, as we shall see from authoritative sources quoted in this book. There is one thought that should be indelibly engraved upon the minds and spirits of the bar. Lawyers are looked up to and sought for ad-

vice when their voice in the councils of the nation and of the State is respected and heard in matters relating to law and its enforcement. When that attitude of the public changes, and God grant that it may never come again upon the earth, the lawyer's usefulness is over and a noble profession might far better be at an end. Every failure to perform a public duty weakens both the individual and the national character. Milton performed a service to the world in characterizing the apology of a bar of his day.

These things are said in deep earnestness, because the lawyers of this country have seen the light of duty and are taking a profound pride in performing it; because the judges looking upon it are pleased and are helping, and because commerce, having faith in the bench and bar, is satisfied and is holding up their hands. No lawyer could view the present enthusiastic and whole-souled response to the call of the American Bar Association for reform and uniformity without feeling a deep sense of pride and gratitude. All over this great and fruitful country men are earnestly engaged in creating sentiment in favor of the great trinity of jurisprudence—uniformity in law, uniformity in procedure and uniformity in decision—and are demand-

ing that the Supreme Court shall be set free to insure its achievement.

Yet, though confronted by this concerted demand, Congress has failed to act. They tell us it is busy. For eight years the organized lawyers, assisted by the organized credit men, have been knocking at the doors of Congress with a completed scientific program upon which they have unanimously agreed. The judiciary committees of the Senate and House of Representatives have favorably acted, concerning which more will be said, but the Senate and House, under the influence of a few reactionaries, have done nothing. In the meantime the great commercial organizations will continue instituting "arbitration commissions" and "trade courts," and may eventually relieve the government of the small matter of administering justice altogether.

## CHAPTER VI.

FIXED INTERSTATE JUDICIAL RELATIONS—  
"THE CONFERENCE OF JUDGES."

Let us now turn our attention to organized interstate relations, another phase of judicature to be more fully discussed in another place. It is most desirable that there should be a full and popular appreciation of the magnitude and necessities of interstate commerce, the utter uselessness and serious detriment of differing State court procedure and the logic of bringing into harmony the varying laws of the different States. There must be uniformity of law, uniformity of procedure and uniformity of decision. Interstate commerce demands them and needs them, and they will come. Out of this conviction grew what has been pronounced to be one of the most marvelous exhibitions of unselfish patriotism and broad-minded, constructive statesmanship that this country has ever witnessed. It was a wholesome evidence of the real commercial and civic unity of the nation, and assured "fixed interstate judicial relations," for which we are striving. Reference is made to the organization of the Judicial Section of the American Bar Association. There was but one way to prevent judicial

conflict and bring about harmony among the State and Federal courts, and that was by a personal exchange of ideas and views—a semi-official conference of judges composed of the representatives of the highest appellate courts of every State in the Union and the several Federal circuit courts of appeals. Able and experienced statesmen feared it to be an impossibility. They concluded that the various State judges would never act in harmony, and, if they did, the Federal judges would not co-operate. The answer was the Montreal "Conference of Judges" in 1913, the first convention of judges in the history of America. Its success shows that nothing is impossible to Americans that is right and founded upon basic principles. If one entertained a doubt about the feeling of the judges and their adaptability for accomplishing things in the interest of the people, he had but to look upon that splendid assemblage of great American jurists and drink deeply of the cup of optimism and faith. It will go down in history as marking a new epoch in the jurisprudence of the United States and of the States. It was an answer to the charge of narrowness, provincialism, individualism and petulant pride of opinion of judges. It was an answer to the pessimistic complaint that judges lacked in an appreciation of practical things and were

not in sympathy with the nation-wide struggle for uniformity of law, of decision and of procedure—the great trinity of interstate judicial relations. It made a new place in the hearts of the people for the judges, that will grow, as there is a better understanding of the import.

As the author had the honor of saying to them on that occasion, and now repeats, that conference symbolized an unselfish love of country and a surrender of personal inclinations that will do more to solidify sentiment and reincarnate the old-time respect and veneration for the courts than any other agency. It has given new inspiration to the lawyers and has added dignity and importance to the campaign of the Committee on Uniform Judicial Procedure in the important task it has undertaken of harmonizing the processes of American jurisprudence. It has given justification to Congress for prompt action. It means the end of seeking after experiment and innovation, for it gives assurance of the general application of a permanent principle that alone can bring State uniformity and insure reasonable justice. It means the beginning of a new and notable era, when laymen and lawyers and judges may work hand in hand for the perfection of the administration of justice. Its place is written

as indelibly in the history of jurisprudence as the Mount Vernon Conference is in the history of commerce. There will lead on from it *interstate judicial relations* as fixed and permanent as interstate commercial relations. The one is compelled by the organic law of the land; the other is made possible by a noble and patriotic judiciary and bar.

The universally small compensation of the judges renders State aid necessary in defraying travel expense so as to assure a full attendance. This will be met by a small annual appropriation of say \$200.00 by each State Legislature. *It is a small premium for commerce to pay for insurance against conflicting decisions.* Its achievement is a sacred and a patriotic duty that some lawyer is ready to undertake in every State, and thereby earn the gratitude of the Bench and Bar, and eventually the people. It must be borne in mind that there is no other ethical way of obtaining these necessary funds, otherwise they would be immediately forthcoming from the purses of hundreds of lawyers who would be glad to participate in this practical way in the far-reaching benefits to be derived from the "Annual Interstate Conference of Judges." The lawyer who believes in the perpetuation of the organic principle of the independence of the States cannot furnish better evidence of it than by



inducing his State Legislature to act with promptness. The Federal government, in the interest of an even flow of interstate commerce, will gradually assume additional power in order to prevent interference of hardships by unnecessary conflict in State laws. State pride should be a sufficient incentive to insure the desire for representation at every conference.

So we have the "Conference of Commissioners on Uniform State Laws" endeavoring to make uniform the statutes, and the "Conference of Judges" endeavoring to make uniform the decisions, and the "Committee on Uniform Judicial Procedure" endeavoring to make uniform the machinery of the courts through which it all must pass. The work of the first, it has been demonstrated, depends upon the success of the second, and the work of no one of them can be complete or permanent without the success of the others. While each commission occupies a distinctive field, a complete co-ordination is their manifest destiny and the achievement of *fixed interstate judicial relations* is their obvious end—an ideal so splendid, so beautiful and so beneficial in every respect as to demand unstintedly the loving labor, time and treasure of the best men of this marvelous age in which we live.

There has been outlined a program for a campaign which means no more or less than

a struggle for the freedom of the bench and bar, that these things may and shall be accomplished.

Let us briefly analyze some general objections to it. The few personal objections raised by four Senators are specifically answered in a later chapter. Congress in the past thought it best knew how the courts should be conducted. Ninety per cent. of the present Congress are not so minded and have given expression to that sentiment. *We should be grateful for the fact that no Chief Executive, while in office, ever suffered from the same egotism.* The imagination is unequal to the effort of visualizing such a catastrophe. That interference is exactly what the plan of our government was designed to prevent, and this policy is without the bounds of safety, as is all usurpation of power. It has been condemned by Anglo-Saxons since they first commenced to breathe the air of freedom. Let there be repeated a bill of particulars. In America it has destroyed all co-ordination between the judge and the lawyer and has forcibly set the lawyer against the court, thus depriving the State of his valuable aid and co-operation in trials. In fostering separate State procedure it has prevented uniformity of procedure and encouraged pride of opinion, both State and individual, and has caused

to be created a distinct Federal practice, a condition never contemplated, the effect of which is discussed elsewhere. It has prevented uniformity of decision for the same reason. It has prevented the lawyers and judges from devoting their best energies, training and wisdom to the preparation of a complete, correlated system of pleading and procedure for the guidance of the law side of the Federal courts and of gradually perfecting it in the light of experience and reason that will elevate the ethical standard of lawyers and of litigants. It has prevented the creation of a model system that most assuredly would be adopted by the States. It has set this nation back a century behind England. It has forcibly thrust upon the people and stubbornly maintains a pretended conformation with State procedure and modified it by unrelated statutes until none but a few experts at every bar dare to make use of it, thereby bringing the Federal courts into disrepute with both lawyers and laymen. The slightest recommendation to Congress for relief, until a few years ago, was considered with the arrogance of pride or ignorance—and nothing was done. Judging from results, the layman has logically concluded that the lawyers did not want anything done, wherein the lawyers have unjustly suffered until patience has ceased to

be a virtue. After due consideration of these grave matters and mature thought of the manner in which these evils could be eradicated, the American Bar Association in 1912 unanimously adopted a resolution prepared by the author and offered in 1911. It is the foundation upon which fixed interstate judicial relations may be erected:

"WHEREAS, Section 914 of the Revised Statutes has utterly failed to bring about a general uniformity in Federal and State proceedings in civil cases; and

"WHEREAS, It is believed that the advantage of State remedies can be better obtained by a permanent uniform system, with the necessary rules of practice prepared by the United States Supreme Court;

"Now, therefore, be it and it is hereby resolved:

"First—That a complete uniform system of law pleading should prevail in the federal state courts;

"Second—That a system for use in the federal courts, and as a model, with all necessary rules of practice or provisions therefor should be prepared and put into effect by the Supreme Court of the United States;

"Third—That to this end, Sec. 914 and all other conflicting provisions of the Revised Statutes should be repealed and appropriate statutes enacted;

"Fourth—That for the purpose of presenting these resolutions to Congress and otherwise advocating the same in every legitimate manner, there shall be appointed a committee of five members to be selected by the President to be known as "The Committee on Uniform Judicial Procedure."

Immediately there was prepared and offered in both Houses of Congress a suitable bill with reference to which a vigorous campaign has been pursued. This short little bill embodies the entire plan, since it leaves all the details to the Supreme Court of the United

States and vests in it the exclusive power to prepare and put into effect a complete, simple, correlated system of rules of procedure and practice for the law side of the inferior Federal courts, just as it has already done for the equity side. That is its featural merit. Congress will fix the jurisdiction and all fundamental matters and questions of policy and permanent procedure and will leave all other matters to the court. It will be a model for adoption by the States, which means uniformity. Of this bill Chairman Webb, speaking for the House Judiciary Committee [Report, *supra*], said: "Congress owes to itself and its popularity, apart from its obligation to its constituents, to face this problem promptly, that it may be solved, and no solution could be more appropriate than that which has met with such universal endorsements as the bill recommended."

The program and the bill has been endorsed by the teachers of every law school of consequence in the country, and has been vigorously supported in the public print by its greatest lawyers and statesmen. It has been formally endorsed by the bar associations of about forty-five States; the National Civic Federation; the members of the executive committee of the Association of Law Schools; by the Southern Commercial Congress; the

Chamber of Commerce of the United States; by hundreds of State and local business, civic and commercial organizations, and last, but by no means least, by the biggest and one of the most intelligent and alert organizations of business men in the world, the National Association of Credit Men of America. That influential group, always on the watch to better commercial and civic conditions and to forward industrial endeavor, fell into line with the American Bar Association in 1912 and has stood by it shoulder to shoulder from that day to this. This action is characteristic of the high intelligence of its personnel and furnishes a reason for the steady advance of American commerce and industry until it has become the wonder of the world. It transpired at its 1914 convention, held in Rochester, that Congress was not proceeding to its satisfaction, and so it unanimously passed and sent to Washington the following preamble and resolution, which is printed here as a typical portrayal of the spirit of the time and the understanding of laymen of their relation to the courts and their intelligent information of the cause of the trouble with the courts:

"WHEREAS, The National Association of Credit Men in annual session at Cleveland in 1913 unanimously endorsed the program of the American Bar Association looking to simplifying, expedit-

ing and lessening of the costs and delay of litigation, which program the committee of the Bar Association continues to faithfully press upon Congress, and which efforts deserve and command the warmest sympathy and earnest aid of the business men of this country; and

"WHEREAS, a complete program, energetically backed by the leaders of the American Bar, has been embodied in H.R., 133, introduced in Congress by Judge Clayton and Honorable E. Y. Webb, and which is now upon the calendar of the House of Representatives with a favorable and enthusiastic report made by the House Judiciary Committee; and the same bill has been pending before the Senate Judiciary Committee for many months awaiting action by that distinguished body, which is engaged in the preparation of more laws that will naturally call for additional litigation; and

"WHEREAS, The potency and effect of a law is measured absolutely by the machinery through which it is administered to the people, and can be no better than the manner in which it is enforced; and

"WHEREAS, The present machinery furnished by Congress, and which the courts are required to use, is universally admitted to be wholly inefficient and in need of a complete reform, both as to the form thereof and the manner of creating it, and Congress seems to be placing the cart before the horse in enacting more law before properly preparing for its administration; and

"WHEREAS, the judges and the lawyers are receiving the entire condemnation for the present unsatisfactory condition, when as a matter of fact it appears that they are bound hand and foot by unyielding statutes arbitrarily enacted by Congress and which they are sworn to follow and obey, though injustice be done by such procedure in their very presence; and

"WHEREAS, The business men of this country are and have been for many years bearing patiently this wholly unnecessary and expensive burden; the judges and lawyers have been condemned for serious faults for which they are in no way responsible, and the power and dignity of and respect for the courts have been greatly impaired.

"Now, therefore, be it and it is hereby resolved:

"First—That the President of the United States and the Congress be and they are respectfully but most earnestly requested to enact into law House Bill No. 133 without further delay;

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"Secondly—That there be conveyed to them the expressions of our confidence in their patriotism and earnestness of purpose, as is evidenced by this petition, and our firm belief that they will promptly rid business men of the wholly unnecessary burden that is driving them from the courts and causing them to resist and to resent all efforts to place their undertakings and assets under the control thereof;

"Thirdly—That we call upon individual business men and business organizations all through the country to convey to the President and to the Senators and Congressmen at Washington the sentiments herein expressed and to demand immediate and favorable action on House Bill No. 133;

"Fourthly—That copies hereof be printed and be presented by the secretary to the public press, the President of the United States, and to each member of the Senate and House of Representatives, with the request that reply be made thereto."

There is another epoch-making thought deserving of grateful recognition and rejoicing. If the Bar Association's campaign meets with no further success, it has been instrumental in aiding business men to find the thorn in the flesh of the courts and order its eradication and in causing Congress to acknowledge its obligation to and faith in the Federal Supreme Court [Chairman Webbs's Report, *supra*]. This connotes the passing of petty jealousies and the existence of a statesmanship, regardless of political division, worthy of the great men who are piloting the destinies of this nation. There remain the usual few reactionaries who enable the history of all advancement to repeat itself in some opposition. Nine years ago Congressman Reuben O. Moon, of Philadelphia, a learned and philo-



sophic lawyer, then chairman of the House Committee on Judiciary, in an able and interesting letter to the author, bemoaned the lack of faith of Congress in and a feeling of jealousy towards the courts and predicted an improbability of success with any bill tending to return them to their normal functions, though it be only in matters concerning technical details of procedure. A new order of things has grown out of an entire change in public sentiment. Thus, step by step, the country is returning to the house of its fathers from which it is prone to stray, and the country is developing into a *union* and not a *confederacy* of States, as existed prior to the Constitution. Three years ago that same committee over which Mr. Moon so ably presided and of which Hon. Edwin Y. Webb is chairman, when we write, in an official report said:

"Given the time, the facilities and the opportunity, it is the universal opinion that the Supreme Court, in an orderly and decorous manner, free from partisan bias and with an eye single to the general welfare, will reform pleading and procedure to the satisfaction of the bench and bar and commerce, and will blaze the way in which the new and greater commerce in interstate relations may develop and move on with safety to itself and to the people."

We have spoken feelingly and with a sense of appreciation and gratitude of the Annual Conference of Judges, its beneficent effect

upon judicature, but we cannot overlook the personal influence and participation of other individuals that enter into its fabric. In its evolution many, and sometimes most unexpected human factors, enter to mar or to preserve and to elevate judicature. These cannot be safely ignored and ought to be sanely discussed. Let us give attention now to those human agencies that preserve and elevate. Sometimes it is a political crisis, two examples of which, though a little ancient, are not forgotten. Sometimes it is the wholesome individuality of a man. It is timely to observe that the contemporaries of these great national figures failed to understand that they were witnessing the molding of history and the laying of the foundation of conditions for the betterment of generations yet unborn. Their eyes were fixed upon the future and they were reading it in the dim light of the past, with a course laid by the ancient landmarks of basic principles of government. It is out of the mist of a receding past that their figures now are lifted higher and higher by the resistless force of the gratitude of a consciously prosperous people, as their broad and fearless and unselfish statesmanship, and the beneficent results of their work and wisdom grow plainer and plainer.

John Marshall was such a man, though, unhappily, death claimed him before the hour of gratitude arrived. Posterity is magnanimously endeavoring to make amends with chiseled marble for the lack of human encouragement and contemporaneous appreciation that left him to battle alone in the shadow of neglect and hostility. The jurisprudence of this country, with the virile personality of John Marshall eliminated, would be quite a different thing. The country would be quite a different nation and the people would not have exceeded the governmental limitations. How much America owes to that one man it will take generations yet to demonstrate. Presidents may come and Presidents may go, but John Marshall will live on forever in the annals of jurisprudence. To him the country is indebted for its fixed interstate commerce relations.

In our own day another man, as an official, has left the impress of his personality upon jurisprudence. Since he is now and proposes to continue devoting his valuable life to the private betterment of mankind, it is meet and proper that his fellow-countrymen for whom he so unselfishly strove should recognize and encourage him. The American Bar Association has done it to the highest extent in its power. Analyzed by the acid test of critical

political partisanship, which is the case when a member of an opposing political party discusses him, he has no prototype in the history of practical jurisprudence. Unflinchingly and in a time of political need, casting from him the tempting life-belt of the Federal court patronage, which in the South composed the leadership and vitals of his party, William Howard Taft unhesitatingly refused to purchase political preferment with the spoilation of the Federal bench. In his selection of a majority of the Supreme Bench and more than thirty per cent. of the Circuit and District judges, during his four-year tenancy of the White House he closed his eyes to political partisanship, sectional feeling and religious influence and was moved only by a conviction that might have been inspired. To him we are indebted for a new era of American judicature.

These things are said because such high official conduct is a condition precedent to that standard of jurisprudence which it is determined shall exist in the United States, let the consequences be what they may. It has withstood the cancerous inroads of politics solely through the high character and native love of law and order of the individual American and the faith of the people in most of their judges and lawyers, and because that

protection, in the very nature of things, must eventually deteriorate and fail. They are also set down with the hope that their successors may profit by their example.

## CHAPTER VII.

SHALL JUSTICE BE THE ACCIDENT OF THE  
JUDGE OR THE CERTAINTY OF  
THE SYSTEM?

In both a scientific and a practical analysis of pleading and procedure there is observed certain fundamental principles of more importance than the substantive law itself, that cannot be safely forsaken. It is seen that their evolution is the history of the resistance of mankind to tyranny and usurpation by government and other power. If it has been shown that these may not sensibly be omitted in any system affording an assurance of swift, impartial and final administration of justice, our humble efforts have been well rewarded. To that end concrete illustrations of the Roman and English systems in their practical application have been and will be given. It is manifest that in the present English system there survives all the merit of the ancient common-law pleading, with a minimum of former procedural difficulties. However, we are contending for no model, but only for a system of court-made rules in which shall be preserved the common-law limitation upon the judge, that whatever is not juridically presented cannot be judicially decided.

In practical application this means that the lawyer retained to try a case shall prepare a simple record of the exact issue desired to be joined and heard and that the judge shall be allowed to alter it upon the record upon motion, after suitable notice, and shall be allowed to consider no other issue. That this prevents surprise or imposition by the judge, the government or one of the parties by creating a new and unexpected issue; or further vexation in the future with the same issue and will afford an intelligent review on appeal, has been made to appear in technical language. Inasmuch as the present program seeks practical results, it is well to point out that the proposed system comprehends and requires no particular form of pleading, but, on the contrary, is best suited to a simplicity that affords no opportunity for subtlety. It thus appears that it is entirely immaterial in what form or under what name they appear, so that at the trial of the case a statement of the facts of the cause of action from which the alleged legal liability can be drawn is presented upon a permanent mandatory record. What possible difference can it be to the suitor whether his debtor is proceeded against in "assumpsit," "debt" or covenant," or any other arbitrary form? It does make a difference, however, that the record shall be reduced to a simple

statement of the claim and of the defense, or a defense and counter claim, with all necessary and liberal amendments. It is well to repeat that the doctrine of *res adjudicata* and the protection afforded by due process of law are in this way preserved. But it is neither just nor honest, nor prudent that that which is not presented in the pleadings originally or by liberal amendment should be judicially decided. The case at bar should be a thing complete within itself, independent of collateral aid not only for present but for future purposes, involving both State and litigant. As a man has the constitutional right to be confronted by his accusers and to be placed but once in jeopardy upon a clearly defined charge, so has he the inalienable right to be explicitly notified of the *intention, reason and alleged legal right to take his property* as well as his liberty.

The other potent thought is that the preparing and answering of this claim is a lawyer's function and not that of a judge. It is inconsistent for a judge to act in a dual capacity. In order for the judge to prepare a pleading, *whether or not of his own volition*, he must know the litigant's case and must advise him the proper theory to adopt. To know this he must consult the suitor and interview the witnesses. Impartiality demands that both



plaintiff and defendant should have the right to require the same service. Having arranged the issues to suit himself, he ought to find no trouble in deciding it the same way. Under these conditions, what would be the lawyer's duty or function? It is a grievous reflection upon a learned profession! No such objection applies to well-ordered amendments, timely made, and the court should exercise a broad, untechnical liberality in aiding justice by suitable amendments. The thought is that judicial procedure must be fixed and established, and not the personal rules of each trial judge or of any judge. By way of illustration it is illuminating to be mindful that safe and efficient service can be had from a boiler without the risk attendant upon dispensing with the governor, which thought is reminiscent of irresponsible steamboat days on the Mississippi river, where "the end justified the means."

Civil liberty and property rights demand this limitation upon courts and government, that a court may not act *sua sponte* except to prevent imposition upon its own jurisdiction. Under such a system the voice of the tyrant or the irresponsible become *obiter dicta* and harmless. On appeal the immateriality and irrelevancy of the evidence and error of decisions are self-evident. It is next to impos-

sible for irregularity not to be overtaken by the reviewing court. Pleading, it thus appears, again is not mere form. It is the only protection between the citizen and arbitrary power, wherein is translated the spirit of freedom and impartial justice. So vital is it to instill this great principle into the minds of young lawyers that, besides the repetition thereof, there will be quoted a portion of that profound work, "Grounds and Rudiments of Law," by William T. Hughes:

"A study of Roman procedure confirms the statement on this subject which we have quoted from Paul, and shows that they fully understood the importance to a republican government of treating pleadings as the foundation of the action. Under their system of procedure the magistrate organized the suit by delivering to a *judex* a written formula by which the power of the latter to hear the case was determined. The preparation of this formula, corresponding to our pleadings, was of the greatest moment, and the 'full force of legal science was brought to bear upon it' [Ortolan, 548]. The *intentio*, that is, the part of the formula in which the plaintiff's case was stated, is the 'vital part of the case and could in no case be dispensed with.' So, also as to the *demonstratio* [Ib. 549-173]. Beyond the terms of the formula delivered to him by the magistrate, the judge was powerless, and the greatest care was exercised by him to confine himself within the limit of the power conferred upon him [Ib. 174-175].

"These formulas or pleadings were strictly adhered to as long as the spirit of freedom lasted in Rome, but with the decline of republican institutions and the substitution of imperial ones they began to disappear [Ib. 287]. Here is a much needed lesson for those of our American courts who are inclined to depart from the pleadings. The downfall of the republican form of government at Rome may be dated from the accession of Emperor Diocletian, who reached the throne A. D. 284, after a period of fifty years of confusion, in which sixteen emperors had perished.

Diocletian openly assumed the power of a despot. We have it on good authority that by the time of Theodosius II, A. D. 440-450, jurisprudence had sunk into abject ignorance and barbarity [Phillimore's *Private Law Among the Romans*, p. 11], and yet the pandects of Justinian, under whom an attempt was made to return to the glory of earlier jurisprudence, contain selections from authors of the time of Diocletian and Theodosius II. It is not strange that an empire which was no longer Roman but Asiatic [Ortolan, 555] should abandon the formula, and that a weak and degenerate people should be content to have their causes tried before judges appointed by a tyrant and without the security of *written* pleadings, which alone could afford them certainty and protection.

Pope said: "Education forms the common mind; just as the twig is bent, the tree's inclined." Disraeli told us "that the more extensive a man's knowledge of what has been done, the greater will be his power of knowing what to do." So the unfortunate experiences of history have not been in vain if they awake a lively appreciation of juridical importance. It is a restriction and limitation upon the direct interference and oppression of the government. It is a greater protection to civil liberty and property rights than armed intervention. In the shadow of a suspended *habeas corpus* lurks martial law and lies the corpse of free citizenship. Arbitrary power, whether on the bench or in the executive chamber, violates the first principles of a republican government. Unrestricted power married to human nature has begotten tyranny, if not corruption, since the beginning of

the world and led a spiritless people into ignorance to draw their inspirations from superstition. It is as important to have checks and balances upon courts as upon government, for both are conducted by men. We are discussing principles, not incidents. A present absence of tyranny or corrupt conduct on the bench or in the government is no guarantee of the future. By the same course of reasoning a ship captain would be justified in discarding his life-preservers because of continued fair weather. Indeed, *shall the administration of justice be the accident of the judge or the certainty of the system?* And, to the surprise of many good people, all these things have been shown to be possible and scientifically certain under the proposed new system of rules of practice.

The founders of the government met and violently dealt with the uncanny confidence in a personal ego, rather than a fixed system. The answer was the adption of the Tenth Amendment to the Constitution, specifically reserving to the States all power not expressly or by necessary implication granted to the central government. An observation of Thomas Jefferson made at the time is interesting and illuminating. "In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Con-

stitution." The patriots of 1776 felt the necessity of insuring that *man shall not be exalted above the law*, nor the machinery of the law. Are we of a later generation so much more patriotic or so startlingly immune to error, or are we simply indifferent? Are we growing morally superhuman? Perish the thought! It is the first symptom of decay. Unlimited power in any branch of government is inconsistent with the rights of a free and independent people, even though they be perfect. Opportunity for the wicked possibilities made probable by inefficiency and partiality, is more to be feared in judicature than is actual corruption. The responsibility and inspiration for the former may be obscured in the meshes of a trial except from unwilling expert eyes, but corruption protrudes upon the vision of the inexperienced.

Seeing only the exception to the rule, well-meaning persons have cited well administered justice in magistrates' courts as an argument in favor of abolishing the mandatory record. But let us see the depths of depravity to which *it may sink*. Charles Dickens' comment on the immortal "Fang" at the trial of "Oliver Twist" is a classic. "Although the presiding genii in such an office as this exercise a summary and arbitrary power over the liberties, the good name, the character, almost the lives,

of her Majesty's subjects, especially of the poorer class, and tricks are daily played to make the angels blind with weeping, they are closed to the public save through the medium of the daily press." Judge Andrew A. Bruce, of South Dakota, brought them down to date [73 Cent. L. J., No. 5, p. 76] when he said that "the letters 'J. P.' are popularly known to stand for 'Judgment for Plaintiff,' that the justice has catered for business like any tradesman and has been only too prone to favor the law or business firm which brought it to him."

The mandatory record fixed inviolate limitations within which the irresponsible or subservient judge may rule, making all else *obiter dicta*, and, of equal importance, it confines the testimony which may be introduced. Oppression cannot be worked without written notice the intent. Now, how could counsel protect if he may not object, and how may he object if there be no limits either to the *allegata* or the *probata*. So it is seen why the evolution of pleading is the history of government itself, and that upon it largely depends the enjoyment of liberty and property rights. Let us see. The doctrine of *res adjudicata* and the protection afforded by due process of law *are made possible* and are assured by the principle that "that which is not juridically presented

cannot be judicially decided." This is the way in which the protection of the State may be practically asserted. Civil rights demand this limitation upon court and government that a court may not act *sua sponte* except to prevent imposition upon its own jurisdiction. "The parties by their attorneys make the record, and what is decided within the issue is *res adjudicata*; anything beyond is *coram non judice* and void." "The courts cannot *ex mero motu* set themselves in motion, nor have they power to decide questions except such as are presented by the parties in their pleadings, original or amended." Neither the common law nor the statute of Jeofails attempted to cure a deficiency not substantially apparent upon the record. This would be a deprivation of due process of law. It is possible and justifiable that defects and imperfections and, under suitable circumstances, omissions in a pleading in substance or form fall within the doctrine of *aider by verdict* where the issue joined by consent be such as necessarily to require proof of the imperfect or defective allegation. "It would be an imposition to extend the effect of acquiescence beyond a common interpretation of an allegation." But we have the weight of the best authorities that defects of substance can never be waived [Brooms' Max., p. 136; Stephen, Plead., p. 13, 6th Ed.].

In another place there will be discussed the practical application of these sacred principles to the proposed uniform system of rules of procedure for the Federal and State courts. Said the Prophet: "Stand ye in the ways and see, and ask for the old paths, where is the good way and walk therein" [Jeremiah, 6-16]. It is proposed to return to the old paths, as we have seen was so happily done in England, which is discussed in another chapter. Let us now turn to another feature of the national life coincident with the scientific simplification of pleading and procedure in America.



## CHAPTER VIII.

## SPIRIT OF THE BAR, PAST AND PRESENT.

Having discussed the vital relation of the courts to government and to commerce, to civil liberty and to property rights; having shown by example and authority that it reflects the very genius of government itself; having pictured it as the keystone of the arch supporting on either side the executive and legislative departments, upon which each lean, and that interference by either department with its sacred functions, produces weakness and eventual destruction, we may profitably turn our attention to some more practical but equally philosophical matters, which will be illustrated by a portrayal of the past and present spirit of the American Bar.

Every observant man finds himself obliged to sympathize with the impatience shown by commerce at present juridical conditions. The disposition of men has changed but little even under the discipline of the ages. We find it set down in Amos (V-7) that there are things "that turn judgment into wormwood." Lord Bacon (Essay LVI) commented, "and surely there be also that turn it into vinegar; for injustice maketh it bitter and delays make

it sour." We find in Proverbs (XXX, 26) that "a righteous man falling in his cause before his adversary is as a troubled fountain and a corrupt spring." Ovid (I, i, 37) says: "It is the duty of a judge to take into consideration the times as well as the circumstances of facts." The opinion is ventured that a court, the pleading and procedure of which is sufficiently technical to permit of interference with the prompt and fair joining of the issue and an unhampered application of the law by the judge, is not a court of justice, but of injustice. It lacks little of being the exemplification of

"The simple plan  
That they should take who have the power  
And they should keep who can."

So the men of interstate commerce have despaired of longer following the advice of Gamaliel to the Jews to await developments, but, very fortunately, have accepted the program of the American Bar Association and the great trinity of agencies engaged under its direction, looking to simplicity and uniformity and fixed interstate judicial relations. I venture the further belief that there can be no lasting judicial, juridical, commercial or political peace in the absence of a proper appreciation of the relations that should exist among the bench, the bar and the men of

commerce, and the time can be profitably passed in contrasting past and present legal history.

Undoubtedly in 1912 the bar of America had come to the parting of the ways, and realized it with a keenness seldom if ever evidenced in the history of jurisprudence. Commerce was determined upon action, preferably by the bar, otherwise by itself. For the first time the bar took the initiative. As has been shown, it unanimously agreed upon a scheme of reform, organized a campaign and set itself to the important task. Awakened to a keen sense of its sacred duty, it demanded the right to perform it in the light of science and with the aid of history. The publicists and orators of the bar during the last several years have been given to introspection, to the consideration of the lawyer's vital place in jurisprudence and organized society and to the study of certain historical weaknesses of their brethren of past generations. There has been evolved from these researches and unselfish tendencies a fixed program which is being diligently and intelligently carried into effect. This program lacks no important feature, because it deals solely with a great principle. It permits of universal agreement because it involves no details, but leaves those to the Supreme Appellate Courts, aided by

the suggestions and advice of practicing lawyers.

But is this beautiful ideal and ambitious task possible? It is, and it is difficult without keen emotion for one mindful of the past history of the bar to contemplate the almost assured promise of success of such a splendid and comprehensive scheme. Never before in the history of the world have lawyers so magnanimously put aside all pride of opinion, personal theories and individual rights and, without reference to politics, religion or State citizenship, set themselves to work to accomplish the simple but well organized program of the American Bar Association, promising the solution of a century old problem and the beginning of a new and historic era in jurisprudence. It promises more; it will enable the Supreme Court to prepare and put into effect and subsequently to amend and perfect as necessity evidences, a complete correlated system of rules for the detail operation of the courts. The trial judge will be set free, within the sensible limitations of these rules, to exercise a sound discretion in all procedural and practice matters. It will enable, if it does not compel, the judge and the lawyer to co-ordinate and co-operate in facilitating trials and in the administration of justice, instead of casting obstacles in the way, as the

lawyer is now permitted and, I believe, compelled to do by statute and his oath of qualification. This means that the State will secure the benefit of the lawyer's help and sympathy in lieu of a present hostility. This attitude will develop in the judge the highest sense of responsibility and judicial acumen, and in the lawyer the keenest observance of ethical standards and an unselfish patriotic view of his noble profession. The destruction of the agencies that forced him to pick flaws in the machinery of justice will be followed by the desire to perfect the new system that he helped to create and for the perfect operation of which he will then find himself jointly responsible with the courts. It will do away with the mystery of stilted forms and the obscurity and uncertainty of subtlety, and there will be introduced directness and simplicity. With one stroke there will be cleared away the eight centuries of rubbish and debris that have been piling up before the door of the chamber of justice and which have prevented many a poor man from entering or else caused him to exhaust his resources in the effort.

In a scientific, organized and well-planned manner there has been evolved a modern structure out of the proved virtues and principles of antiquity and the best practices of the day in which we live, that is so fashioned

that day by day it can be made to fit the changing hour without the sacrifice of a single principle. It means that in the bench and bar, in happy co-ordination, is to be reposed the sacred trust of guarding, perfecting and gradually improving the instruments which they are daily called upon to use in administering the laws. They are the sole human elements entering into jurisprudence and the sole agencies properly prepared to perform the task. The Congress and the legislatures will refrain from regulating the details of procedure and practice by rigid statutes, retaining control, however, over all fundamental and jurisdictional matters, questions of permanent procedure and of evidence. It means that the legislative department will tell the courts what to do, but not how to do it. It means a new era in the history of jurisprudence, a new and wholesome relation of the lawyers and judges with reference to a manifest duty concerning a technical governmental function in its relation to commerce and society. It means a new and wholesome attitude of the lawyers towards one another and towards the judges, and it promises a return of the old-time faith in and respect for the judges and the lawyers. These are the things for which we are striving and which are comprehended in the American Bar Association's

program. And all of these things are not only possible, but assured by the foremost members of the American bar if Congress will but set the Supreme Court free to perform its important part.

It is time for the lawyers, so deeply absorbed in the daily routine, to look about them. Things, as time is measured, have been changing with kaleidoscopic rapidity. This country has undergone a reversal of sentiment within the last brief decade that in time will prove a marvel to all thoughtful men. More than twenty-five years ago Grover Cleveland prophetically remarked:

"To me nothing can be more deplorable than that open criticism of the decisions of courts which, all at once, has become fashionable \* \* \* they are danger signals and failure to see them may introduce practices which will threaten the independence of the courts. \* \* \* If their decrees are not respected, or the judges, who preside over them are not men of the highest reputation for ability and fairness then all the forces of discontent will unite in an assault upon them."

Within ten years thereafter there was a partial fulfilment of his prophecy. Within twenty years its shadow had caused the great American Bar Association to feel justified in sounding an official warning. Within twenty-five years it had perfected organizations for a militant campaign of resistance and of education, and was calling the lawyers to its colors. Five years ago lawyers of national reputation, who are now most actively engaged in the

campaign of modernization, looked skeptically upon the task. Today they not only predict the success of the American Bar Association's program, but believe in it, and believe that the doctrine of *interstate judicial relations* is but a matter of time and education. But there have been many things to bestir them. For fifty years commerce and society have been persistently demanding relief from the expense, complexity, technicality and slowness of the procedure provided by Congress and legislatures for the detail operation of the courts, from which they had already suffered for more than half a century. Impatience has more than once threatened to strangle Justice with ill-fitting expedencies that but aggravated the trouble, because they resorted to the favorite plan of the despot of destroying a principle for which the Hebrews prayed, the Athenians and Romans fought and the Anglo-Saxon died and which brought our forefathers to this country—the *independence of the judiciary*.

Let all else fail, but so long as the courts stand, the country will stand. When the courts weaken or fail, the government likewise will weaken or fail. The most sacred duty beckoning and calling to American manhood today is to guard the doors of the court-rooms against the entrance of political and



personal ambition and all manner of wickedness under the leadership of self-serving opportunists. And let it be repeated, that any government that permits the legislative department, a group of individuals or one individual, or any other agency, to place a hand upon the finger of the judge when he signs a decree, is not a government of justice amongst men, but is the instrument of oppression in the hands of tyranny. It is difficult for the citizens of this Republic, even when in a most grateful frame of mind, to appreciate the blessings bestowed upon them by an indulgent and forgiving Providence. It is equally as difficult for us to measure up to the profound duty of maintaining these governmental agencies at the high standard of the day in which we live.

Yet one must be pardoned for wondering at the absence of an earlier, organized response by the lawyers, for they did not act until the absolute necessity stared them in the face. Both the machinery of the courts and the judges were being assaulted. The time had actually come when the bench and bar must, or some other agency would reform judicial procedure. It would be merely gratifying curiosity to delve into the cause of this delay. If one may be permitted to say it, the lawyer of all people should not only modern-

ize the instrumentalities of his profession, but should have a keener insight into all human endeavors, aspirations and inspirations than the followers of any other profession or endeavor. His highest duty is to advise, and if this be properly and sincerely done he must himself have an intimate knowledge of the workings and conflicts of both public and private affairs.

I venture to assert that the standing of the lawyers and judges of a country mark that nation's position in history. Brilliant soldiers, comet like, flash their destructive existence across troubled political skies and great statesmen formulate and initiate profound governmental policies, but the work of the jurist and the lawyer is interwoven with a delicate, intimate touch into the very warp and woof of a nation's life, ever regulating the most sacred relations of her citizens. It is constructive statesmanship of the highest class and, in the order of responsibility, ranks next to the church. What a sacred responsibility it is! Let there be a deep conviction that people cannot lose faith in their lawyers and judges without losing respect for and refusing submission to their courts. As the courts weaken, so the government will weaken and no policy can be put into effect. A strong, enterprising, philosophic and militant bar is

coincident with a strong and popular government and a contented people. This is but natural. The demands and practical details of a commercial life are too numerous and exacting to permit of the research, thought and philosophy that falls naturally to the lawyer's lot, however intellectual, educated and able may be the business man.

"And just experience tells, in every soil,  
That those that think must govern those that toil."

In a word, the trouble with the lawyers in the past has been an inbred conservatism and caution that engendered antipathy to all change, thereby destroying or greatly reducing the prospect of progress. One would like to find an excuse for this proverbial lack of advancement, for it rests in temperament and not in reason. The law is a science, and the administration of it is a highly technical governmental function. The preparation and qualification for it is purchased only by years of unremitting toil and personal sacrifice. This is particularly true as to a working familiarity with the subtle, technical procedure and practice prevalent in the courts, and one casts adrift that dearly bought knowledge with reluctance. Nothing but a deep and abiding love of country, or response to the call of public opinion, has ever been able to tempt or to drive lawyers to agree to any

change. They seemed, as a profession, to have been unable to lift their studious gaze from the machinery inherited from antiquity in order that they might see the greater and broader demands of the present and future. It called for change, and novelty is anathema to the lawyer.

The result is, and the statement is borne out by history, that judicial procedure has always lagged behind the commerce it was created to serve, and until the year 1912, when the American Bar Association acted with a splendid unanimity never before witnessed by an admiring world, it has been a bone of contention and strife. Lawyers simply could not or would not agree upon a change or else the manner in which it should be made. It was always a question *of form*. They professed individually to believe they were improving through the agency of unrelated, unscientific statutes, a dreaded example of which is our much-complicated Federal procedure.

This inspires the comment that no agency of a representative government that fails to touch the popular life, that shrouds its workings in mystery or that renders doubtful its ends by subtlety or technicality, can perform its normal functions or command the requisite popular respect and individual submission. This means it cannot live, though it may op-

press and burden the people for half a century or more because of ignorance of the way in which to rid themselves of the incubus. Directness and simplicity are the keynote of republican forms of government, as they are the bases of manly character, the watchwords of commerce and conditions precedent to the usefulness of every governmental function and human relation.

The abolition of the use of Latin in the pleading and procedure of the English courts is an example of early resentment to mystery in the courts. As early as 1360 pleas were required to be written in English, but in 1609 James I wholly abolished it, saying: "I wish the law written in one vulgar language, for now it is an old, mixt and corrupt language only understood by the lawyers." It is an interesting coincidence that King James I should have been inspired to express that sentiment at the time of the announcement of the publication of the Revised Version of the Bible. William Duane, of Philadelphia, who will be remembered as the editor of the "Aurora" and who was tried in 1799 for a breach of the "Alien and Sedition Act," spoke some wholesome truths even while he was committing many indiscretions. He inveighed against both the church and the bar for their inclination to mystery. He pointed out that

the Bible had been printed in a strange language in England, and that by "farrago of finesse and intricacy and abstruseness the lawyers had brought the science of law into ill repute and suspicion." This policy could survive only with the ignorant. Wholesome, clear-minded, deep-breathing, liberty-loving Americans can not long be led in the devious roads of ignorance and mystery. Faith and patriotism can not so sweetly soothe the curiosity or dull the natural and national sensibilities that an intelligent man will permit another to do all his thinking, whether right or wrong. Our forefathers fled from the tinsel-pomp, mysterious mutterings and obscure deliverances of ancient England to the freedom and frankness of American institutions of their own devising and there is not wanted any of its livery in our courts.

Coke, in the preface to the third volume of his Reports, viewed it in the interest of the public weal. He commented that all law books had been written in Norman French or Latin because "it was not thought fit nor convenient to publish either those or any of the statutes enacted in these days in the vulgar tongue, lest the unlearned, by bare reading, without understanding, might suck out errors and, trusting to their own conceit, might endanger themselves and sometimes fall into

destruction." Chancellor Kent, however, was more selfish, and confessed that he made use of the *corpus juris* because the bench and bar of his day were unfamiliar with the French and the civil law and, therefore, "I could generally put my brethren to rout and carry my point by my mysterious wand of French and civil law." This was a bad example, if an honest confession, and it is set down here that it may be seen that the greatest lawyers were not above capitalizing mystery.

Samuel L. Knapp, an interesting observer and writer of his day (1821), [Biographical Sketches of Great Lawyers and Statesmen], in speaking of the attitude of the lawyer to the public in 1774 spoke bluntly of the effort to commercialize mystery and said:

"It would have been in vain for any one man to have attempted a reformation, for most practitioners at that period would have united against a change, from the mistaken idea that business depended on *giving an air of mystery to the proceedings* of the profession, forgetting that no science, however difficult to attain, *has any mystery in its farthest researches or in its remotest principles*. It can hardly be believed at this day, but it is a fact, that many old lawyers, who were in full practice when Blackstone's Commentaries first appeared in the country, were frequently heard to regret and complain that he should have so simplified and arranged his subject, and so clearly explained the principles of law, that the same amount of knowledge, which had cost them many years to collect, might be obtained in a short time."

In the light of the present frank and wholesome attitude of the bar to the public, and the

co-operative spirit displayed by the largest commercial organizations, one feels at liberty to cite these instances because they serve to illustrate what I venture to believe to be a past improper attitude of lawyers to laymen, and particularly to an intelligent commerce. Mr. Knapp spoke a profound truth in saying that "no science, however difficult to attain, has any mystery in its farthest researches or its remotest principles," and I venture to add that there is no necessity for any in their enforcement. May it not be possible, as Lord Coke intimated, that mystery in court procedure and in professional conduct may also be a cloak hiding the sneaking form of ignorance because "the unlearned \* \* \* have sucked out error, have trusted to their own conceit," and find their only protection in technicality, subtlety or obscurity in attack or defense. It is difficult to believe that in this day there are any who would deliberately commercialize the noble profession by veiling in mystery and all manner of technical form the enforcement of the great principles that have been the light of the world, the hope of civilization and the assurance of Christianity since the dawn of creation. The trend of the day in jurisprudence is toward the wholesome atmosphere of simplicity and directness. This is the only lasting inspiration of faith, respect



and love on the part of the individual, submission to governmental restraint and the elimination of the personal equation that makes possible the general welfare.

The opinion appears justified that the real plague distempering the body politic and laying at the root of the lawyer's trouble was lack of organization. They initiated nothing as a great, organized profession and found themselves unable to agree to the proposals of the politicians who were spurred to action by the very indifference and reactionary methods of the lawyer, and there soon fell upon and vexed the earth a system of inelastic, unscientific "codes" not one of which has survived in any semblance of its original form. The manifest lesson taught is that the judges and lawyers must feel obliged to cause themselves to be put into position to keep pace with the stride set by their fellows engaged in a great and growing commerce, or else submit to inevitable public censure and the humiliating spectacle of observing its house kept in order by the legislative department. Bar associations are the greatest possible agencies for promoting the general welfare, and so long as they thrive there can never be a repetition of past derelictions. It is most painful to confess that the records of history do not make unnecessary, though highly illogical, the usurpation of ju-

dicial powers and duties by the legislative department of which complaint is now so justly made. The bench and the bar in yester-years sowed the wind of indifference and a lack of co-operative progress, and in due course have reaped the whirlwind of legislative guardianship and a weakened public confidence. The polar star that should guide this generation is the restoration of public confidence in the bar, and all else will follow.

Every great reform intimately affecting daily intercourse or commerce must undergo the three stages of *investigation*, *education* and *legislation*. Manifestly, reform means change, and change involves inconvenience, if not hardship, for some individuals. Mindful of these practical influences, there were lawyers who looked skeptically upon the realization of the far-reaching reform leading to interstate uniform judicial relations, and, while applauding the thought, felt restrained by the labor imposed. But there were men ready and prepared to undertake it as a duty to their people. The result is that we have lived to see the lawyers and the men of commerce investigate, then help to educate, and finally demand of the Congress that it legislate. Thus two stages of the evolution have happily been completed, and it but awaits the action of Congress.

But some one has said that there is being promoted a novel thought in the advocacy of uniformity of decision and uniformity in procedure. The American Bar Association claims no such honor. As a matter of fact, the ideal is as old as governments on this continent and was advocated in England just prior thereto. In the year 1764 Thomas Pownall, described as "late Governor, Captain-General, Commander-in-Chief and Vice-Admiral of his Majesty's Provinces, Massachusetts Bay and South Carolina," and then Governor of New Jersey, said [The Administration of the British Colonies, by T. Pownall, 1764]:

"I cannot in one view better describe the defects of the provincial courts in these infant governments than by that very description which my Lord Chief Justice Hale gives of our County courts in the infancy of our own government; wherein he mentions, First, the ignorance of the judges, who were the freeholders of the country. Secondly, that these various courts bred variety of law, especially in the several counties; for, the decisions or judgments being made by divers courts and several independent judges and judiciaries who had no common interest among them in their several judicatories, thereby in process of time every several county would have several laws, customs, rules and forms of proceedings."

This seems to be the first authentic appeal for fixed interstate or rather intercolonial judicial relations. It is most encouraging to the disciples of that wholesome philosophy who strive in the year 1917 to find it advocated in

the very dawn of governmental relations in America and in the age of the keenest strife in England's legal history. It is most reassuring that such a great and profound jurist as Sir Matthew Hale should have observed the identical difficulty in England's jurisprudence and set about correcting it against an indifferent, if not a hostile, public opinion. In 1653 Sir Matthew was made chairman of what appears to have been the first official committee on law reform organized by the Anglo-Saxon people, if there be omitted the group of soldiers and barons who officiated at the sealing of Magna Charta [Campbell's *Lives of the Chief Justices*]. Associated with him were Cromwell, Sir Algernon Sydney and Sir Anthony Ashley Cooper, names that have become by-words in history. As a comparative study it will serve a purpose to point out that the obstinate English mind chose to view many recommendations as innovations instead of a common-sense application of ancient principles. They went to the extreme of rejecting the registry of deeds which was already in vogue in the colonies. Yet those same people completely revolutionized their court procedure in 1873 and co-ordinated their courts, while the American States, with four exceptions (New Hampshire, Connecticut, Vir-

ginia and Colorado), are a century behind, and, instead of harmonizing State procedure and decisions, have gone to the other extreme. Each State Supreme Appellate Court seems to find a peculiar pride in pointing out where it cannot agree with its learned brethren of another State, and each legislature has its own panacea in the form of a code.

I yield to no man in a faithful allegiance to State's rights as they were learned at the feet of that profound constitutional scholar, John Randolph Tucker of Virginia, but I am not insensible of the manifest obligation of the individual States, like members of a family, to surrender private opinion and even rights in the interest of the general welfare. My idea of the union of States, in their intersate commercial relations, is that of the three musketeers—"one for all and all for one." It is that taught by Æsop's fable of the bundle of sticks—fastened together, they are unbreakable, but, separated, they are easy prey. Let us weld them closer together by the co-ordination and co-operation that will follow this ideal of uniformity in all general matters. Indeed, no State can live unto itself, if it would, and no State Supreme Appellate Court can do so with profit to itself and to the people it serves and without harm to those it serves.

The greatest benefit of a broad, neighborly and liberal judicial attitude towards their brethren of other jurisdictions will necessarily inure to the advantage and very practical assistance of the men of commerce of one's own State. It will encourage industrial activity, create common ties and dissipate local conceit and selfish pride of opinion as to matters of interstate importance and not purely local in effect.

The courts are to the government and to commerce what the locomotives are to the railroad and to commerce. The railroads cannot be conducted without locomotives, and governments cannot be conducted without courts. Logically extending this metaphor, a great trunk line may connect the two oceans and traverse the wide expanse of prairies, fragrant and rich with the harvest treasure; there may support it the wealth of a Cræsus, and direct it the genius of a James J. Hill, but if it be heckled and retarded in each State through which it passes by a dissimilarity of laws and regulations, it cannot properly perform its interstate functions. It can rise no higher and be of no greater service to the nation of States than a combination of local trains operated under differing managements and policies, and no national usefulness and greatness can come of it. Now let the thought be applied

to the policy of the several States courts. The various State governments may entertain the best intention toward the splendid interstate commerce that the best interests of all government require shall be fostered, yet the potency of their laws is measured exactly as they are administered by the courts. If State court decisions lack uniformity and their diverse procedure and practice burden and hamper business that is projected or invited into or through a State, or if justice be interrupted by local traditions or influences, a feeling of hostility towards the courts of that State will surely follow. Another thought arises. It need but be said that, in the event of a struggle between commerce and the courts, commerce will prevail, because the courts are but its agents, though they likewise enjoy the dignity of being governmental agencies. How unwise and unprofitable it would be, then, to struggle against a reasonable request for uniformity of law that has become so essential during this twentieth century. Commerce is the life blood of any country, the only measure of its prosperity and success, and the government that best maintains it, is best.

Mindful of these things, it is with interest that one observes the organization and workings of three great civic agencies looking to *uniformity in statute, uniformity in procedure*

and *uniformity in decision*, all under the control of the American Bar Association. They are the "Conference of Commissioners on Uniform State Laws," the "Committee on Uniform Judicial Procedure" and the "Interstate Conference of Judges." They give an assurance of interstate judicial relations as fixed, necessary and useful as fixed interstate commercial relations.



## CHAPTER IX.

CONTEST BETWEEN THE MORAL AND JURAL  
LAW.

Let us depart now from the consideration of the machinery for administering the law and enter into a contemplation of some phases of the philosophy of the law itself as it influences man, his spirit and his conduct. The belief is here ventured, and it is further laid down as a premise, that the tendencies of human nature today are not materially distinguishable from those of the peoples who took their rules of conduct from Hammurabi, Moses, Lycurgus, Solon, Justinian and Napoleon—the great historical and mythical lawgivers of the world. If any difference there be, it but reflects the evil influences of governmental machinery permitted to become obsolete. Men, overwhelmed by badly administered law, are like men overwhelmed by a flood—they strike out blindly and catch at straws. In such a cataclysm strong, organized relief is essential, which is the pivotal thought of the observations to be made. Certain it is that we of this generation lay much store by the principles they propounded, that have outlived crusades, the decadence of peoples and

of nations, and have come to us shining imperishably like bright jewels in the ash heaps of the ages. Modernity, therefore, will do well to search diligently for and studiously avoid the causes that led to the destruction of the governmental systems for which these great lawmakers were responsible. It is well, also, to be mindful that this splendid Republic was created for an original people, a race of pioneers, whose form was copied from no predecessor.

This government will live and be strong just so long as the principles conceived by its makers, and particularly its three subdivisions of power, are observed; just so long as a necessary response to the demands of inevitable evolution continues to prevent man from becoming greater than the law; all the while keeping the law in proper subjugation to individual human rights and improving the machinery thereof, so that it always may be modern, practical, sensible and suitable to the prompt, economical and direct vindication of these rights. These things are conditions subsequent and are true, whether the act of the government be one of protection or of deprivation of natural rights in the interest of society. The corollary to that proposition is that we must do more than simply enjoy an inheritance that someone else created for us.

We must strive to modernize and to improve it. The legacy of law and principle left by our forefathers are so many talents, which we may not wrap in a napkin. Neither may we convert them into a fetish. Thomas Jefferson explained his opposition to certain proposals for the Constitution by predicting that "our children will prove as wise as we are and will establish in the fullness of time those things not yet ripe for establishment." The question for us to answer is: Have we, nearly a century and a half afterwards, kept the faith, particularly with reference to the judicial department of government, by living up to Jefferson's expectations? Are we conservatively progressing or subserviently retrogressing? Nature abhors a vacuum and makes corruption of stagnation. In the history of nations there ever has been evolution or revolution.

It was a woman (Madame de Stael) who declared "that past which is so presumptuously brought forward as a precedent for the present is itself founded on an alteration of some past that went before it \* \* \* ." Tennyson said: "We are the ancients of the earth and in the morning of the times."

These simple truths seem to underlie and to justify the progressive campaign of the American Bar Association in its conservative efforts to set free the judicial department from

the legislative; to modernize the courts; to segregate purely commercial litigation, and to bring laymen to a better understanding of and into a more sympathetic relation with the judges and lawyers. Its importance cannot well be overestimated. It is profoundly believed that the relation existing between the layman and the lawyer measures the strength of the government and defines its genius. From the beginning of the social compact there is no human endeavor of consequence without the association of the lawyer. The great Jewish doctor of laws, Gamaliel, figured in the life and conduct of the Apostles and saved them by giving to his people conservative, practical advice concerning their public policy [Acts, V:34]. In the first days of the Israelites we are told that God sent judges to deliver the people; that they administered justice, and their authority even supplied the want of a regular government.

A popular condemnation of judges and lawyers in the past has been a certain symptom of governmental weakness and deterioration. A strong bar, which is the concomitant of a great bench, has ever been symbolic of a strong, prosperous and contented people. Indeed, of the three divisions of government, the judicial department, of which the lawyer forms a most important part, is the corner-

stone, as it is the guide-post that keeps straying feet in the straight and narrow constitutional path; gives confidence to commercial enterprise; stays the threatening hand of oppression, and gives assurance unto the weak. I venture to assert that the executive and the legislative departments might cease their operations for a given time with no other result than inconvenience. But the suspension of the functions of the courts for one day would mean anarchy—when might, and not right, would become the measure of civil liberty and of property rights. How important it is, then, that in the practical application of the jural law the people should respect the bench and the bar; aye, should reverence them and look to them as the preservers of their sacred rights. And what a noble obligation rests upon the judge and the lawyer to measure up to this high calling, particularly by impressing his personality and wisdom upon the framing and operation of the judicial department of the government!

Three pregnant thoughts may now be considered. The first is that the enactment of conflicting and uncertain statutes, or the overloading of the books with a plethora of unnecessary laws concerning intimate personal relations, means that courts must be multiplied, burdened and delayed and the people

confused. The second is that both the lawyers and the judges will be overwhelmed with a great mass of undigested mental diffusions parading in the sacred vestments of judicial decisions or dignified statutes. The third thought is that, turn as one will, the lawyer and the judge, and not the opportunist or self-centered legislator, are the direct victims, and for that reason, if for no other and higher one, are selfishly interested in the legislator's attitude towards the judicial department. Let it be emphasized that upon them must rest the sole responsibility for the scientific evolution of the law. The legislative department must therefore set them free, that this duty may be performed. The proverbial patience or subserviency, as you please, of the lawyer has ceased to be a virtue. It has become a menace to the government, to his own safety and standing and to that which he holds most sacred. Can the continued usurpation by the legislative department of the functions of the judicial department sustain a government against the very genius of which it shows hostility? It is a sense of this dual personal and professional responsibility resting upon the lawyer at this particular era in the evolution of our governmental life that it is desired to awaken into constructive militancy.

No observant man will longer dispute the fact that this country is on the threshold of an era-making juridical reformation similar to that achieved in England in 1873. The lawyers have almost unanimously accepted the new program, and if they now embrace the opportunity to demand its adoption, it is devoutly believed that they will have performed a greater public duty than had they laid down their lives in battle. The organized voices of upright men earnestly contending for a righteous cause can and ever will be heard. It is a profound duty that this campaign be kept out of politics, but a profounder duty to see to it that it succeeds.

We have in this and preceding chapters been discussing the law and its makers and its administration, but let us go deeper and consider the human nature and the spirit of the man for the regulation of whose conduct the laws are made, for there interesting causes of dissatisfaction will be found. It will appear that the representatives of the people, many of whom are lawyers, have been giving ear to the boisterous brooks that soon lose themselves in the river, and have paid little attention to the deep, serene and irresistible power of the great philosophic stream of humanity. As has been indicated, neither our government nor our people find their prototype in modern-

ity or in antiquity. We must legislate for an original people, from whom, may Heaven be praised! a deep-seated, unselfish, patriotic spirit in the social and national life has not entirely departed.

Some time ago it was my privilege to attend the "Sportsmen's Show" in New York. One man of the many little groups that filled the "Grand Central Palace" attracted attention not alone on account of his prowess with rifle and rod, nor his adventures and temporary abode in the boundless stretches of the far Northwest. It was the reason that drew him away from the ordinary routine of the much-vaunted organized society of the twentieth century, in which every thoughtful man must be interested. Standing well up in his boots, his big frame spoke forcefully of physical health, and his clean eyes, looking straight out from an intellectual face, interpreted eloquently a clear brain and a wholesome, cheerful nature within. He was an unspoiled, natural man.

The sportsman gave his reason in one sentence. This intelligent and intellectual man, resenting the multiplied and conflicting rules of conduct as translated in the form of statutes and reported cases and the crippling of character by the inroads of paternalism in government, was drawn into the unsurveyed wastes



of the mountain fastnesses *in search of a country where a man could still make his own law*. The spirit that was within him yearned for a land where he could turn his face to the Maker to whom he acknowledged responsibility and final sovereignty, unrestricted by the artifices and egoism of man. "Nature is mighty. Art is mighty. Artifice is weak. Nature is the work of a mightier power than man. Art is the work of man under the guidance and inspiration of a mightier power. Artifice is the work of man alone in the imbecility of his mimic understanding."

With complete satisfaction, one would select him out of the complex social fabric as being sufficiently far above the average citizen as to wish to know his outlook upon society as it is organized; his ideas of political science; indeed, his philosophy of life itself as these factors enter into, make up and measure the participation of man in the affairs of the brief span allotted to him. And we shall presently see that his views were but observations of the practical contest that is now going on, and that ever has gone on, between the moral and the jural law—between the innate sense of justice voluntarily done, and the artificial standards of conduct enforced by organized government. Obviously, wherever groups of men have their homes in the world, there must

be some restraint, for law is inherent in society. The merit of such government is reflected in the general rules of conduct by which rights and duties may be determined and organized. That phenomenon is the course of the jural law subjugating and taking the place of the moral law, and the respective proportion of the two is the measure of personal character and citizenship.

Taking this sportsman as a fair example of citizenship, does not that cry typify the normal man that laws are made to govern? Is it not of the first importance to permanent civilization that organized society should aspire to such a standard? Is it not a true reflection of the real human spirit that it is desired to regulate and, in its analysis, becomes intercourse between the creature and his Creator? Is it not the spirit that should pervade the body of the law and the policy of the government? That being so, is it well to depart far from its simplicity and wholesomeness in the erection of artificial rules of conduct—the substitutes, considered by Congress and the legislatures to be necessary for the moral law? And while we shall presently see some practical governmental evils following its violation, the ravages upon the ideal citizenship may be fairly well deduced.

A policy of paternalism in government and statutory morals is not keeping the faith with the pioneer spirit. We boast of a progressive country, but when men are taught to lean upon the government, instead of supporting it, the nation is not progressing. It is retrogressing. A nation is no stronger, purer or better than its people. Governmental improvement is simply a corollary to individual improvement. That is the reason for popular campaigns of education. It was a sense of personal responsibility and individual independence that conceived governmental independence and won it in America, and it is that spirit alone that will preserve it. This country needs fewer new laws and more real men. It needs less jural regulation and more moral sensibility. It needs less public training and more domesticity. It needs fewer codes and more familiarity with the Decalogue. It is certain death to manhood and good citizenship to lead men away from personal responsibility and self-reliance into the delusion of artificial standards.

"In vain we call old notions fudge,  
And bind our consciences to our dealing;  
The Ten Commandments will not budge,  
And stealing will continue stealing."

But let us continue in the train of our Sportsman's observations, for they bubble

forth from the crystal spring of the unconquerable human soul. Of him it may be said that "well roars the storm to those that hear a deeper voice across the storm," and Marcus Aurelius epitomized his personal philosophy in: "This being of mine, whatever it really is, consists of a little flesh, a little breath, and the part which governs," that part which, though living with the finite, reaches out everlastingly after the Infinite in all tongues and in all conditions of human beings. I wish to believe that this inclination in the red Indian, the black Hottentot and the pale Caucasian is an involuntary effort at a response to a universal law, a system of rules contemporaneous with the creation of man and the world which he inhabits. "Infinitude silently walks amongst men like beauty invisible in the landscape," and the designation of this as a Christian nation is but a judicial recognition and an attempted application of this great principle.

We are willing to take our natural philosophy from the scientists, and to believe that the whole scheme of creation is controlled by principles and a system of rules, fixed and unchangeable, and often too simple to attract the attention of the wise and prudent, whilst they are revealed unto babes. How many of us, as we stand and gaze into the starry ex-

panse of night, admiring its grandeur and its beauty, reflect upon the perfect system of rules and laws that keep the trillions of stars and the planets in their charted courses and send the earth whirling in its orbit about the sun on a schedule so simple that man may measure dimensions and speed and fix their stations at any moment in the past, the present, or future! It requires no trespass upon individual religious dogma to believe that this systematic and orderly operation of rapidly moving masses in limitless space is not accidental, nor the outcome of expediency or of experiment. It is a fixed and a designed program, the performance of which is the result of inexorable natural law and of profound principle.

One need not speculate upon the direful result of the violation of the simplest one of these natural laws, save as it may serve to illustrate and to give reason for the application of like rules to man and the moral law that regulates his existence. And no more does one know the present nor the final penalty, nor the present nor the final result of breaches of the moral law. Without caring what view others may take, or acknowledging that our premises require a solution of the world-old problem, as for me, I do not believe that the presence of man on earth is any more of an accident than the organized solar system, or that

the jural law could forsake that principle and live. An analogous condition would be the regulation of his relation and conduct by certain fixed principles and rules equally as inexorable.

Is there not, then, both analogy and reason for the belief that there is a common source of justice, though it may never be found and understood by man, from which all jural law should draw its spirit and power? Lord Chesterfield said to his son: "Let us aim at perfection in everything, though in most things it is unattainable. However, they who aim at it and persevere will come much nearer to it than those whose laziness and despondency make them give it up as unattainable."

"Success is not reached by a single bound;  
And we mount to the summit, round by round."

If as much popular attention and recognition were given to the philosophy of the moral law as is given to the science of the natural law, there would be less need for arbitrary jural laws and experimental courts in which to enforce them. The public would cease running to a paternal government for a cure for every social ill. There would be more unspoiled natural men and women and fewer "isms" and "uplifts." They would find the cause of the malady largely in themselves and a lack of spiritual and mental discipline,

and would eradicate the cause, instead of complaining of results. The average school child knows more about natural philosophy than the average man knows about moral philosophy. It would greatly aid the Constitution to interpolate St. Luke, 10:27. And let me diverge a moment to emphasize that, as the astronomer is the exponent of the natural law, so the lawyer must be the exponent of both the moral and the jural law. His client will seldom rise above him; he will often sink to the client's level.

There is no better example of this than the achievements of the English people and the English bar. Her most honored men today are her lawyers. How difficult it is to look upon that enlightened, cultivated and powerful nation whose influence for good is felt around the world, and find justification for Milton's satire or believe Macaulay's description of the people immediately following Cromwell's protectorate. Said he:

"Without casting one glance on the past, or requiring one stipulation for the future, they threw down their freedom at the feet of the most frivolous and heartless of tyrants. Then came those days, never to be recalled without a blush, the days of servitude without loyalty and sensuality without love; of dwarfish talents and gigantic vices; the paradise of cold hearts and narrow minds; the golden age of the coward, the bigot and the slave. \* \* \* The government had just ability enough to deceive, and just religion enough to persecute. The principles of liberty were the scoff of every grinning courtier and the ana-

thema maranatha of every fawning dean. \* \* \* Crime succeeded to crime and disgrace to disgrace, till the race, accursed of God and man, was a second time driven forth to wander on the face of the earth and to be a by-word and a shaking of the head to the nations."

Now, what obvious deductions may we draw from these thoughts? It is the failure to observe the moral law that brings the jural law into existence; the rapid legislative substitution of policy for principle, and the iniquitous doctrine of all things being right not forbidden by statute. It is the presence of these jural laws that is crowding the dockets of the courts. It is a failure to keep these laws that is demanding additional courts and commissions without end.

The plethora of statutes and remedial commissions may be likened to the effort, with many small vessels, to catch the water from a broken pipe instead of stopping the leak. That means that the road is one without end. Where we shall drop out of the procession one does not like to speculate, unless there comes a recrudescence of the pioneer spirit, and a livelier awakening of the individual conscience to a sense of personal and public responsibility and duty. This is the task before the American lawyer, in a smaller measure, as it once confronted the English bar as a matter of life or death.



Let me ask what is the message carried by the conceded necessity for "domestic" and "juvenile" courts? Has an end been achieved by establishing these extraordinary forums? Far from it, indeed! They are merely results—danger signals, pointing to a diseased social status—not remedies. Have we searched our minds to justify them, and have we read the answer, that this is one instance where the jural law cannot be substituted for the moral law? If we continue dealing with results and ignore the causes, obviously the results will be multiplied until the very moral status of the nation is weakened. It is taken quite as a matter of fact that Nevada is today capitalizing and legalizing one of the chiefest vices of the nation. This is a preventive age in everything except social relations. We need a little less governmental, "Thou shalt not," and a little more personal, "I will not." Said Disraeli: "When men are pure, laws are needless; when men are corrupt, laws are broken."

## CHAPTER X.

THE PREVENTION OF LEGISLATION AND  
LITIGATION.

It is believed that a proper understanding of government should be carried to the ranks of the people by the trained and thoughtful lawyer, and that their patriotic labor is to him a sacred professional duty. The opinion is ventured that the message will meet with a popular reception and that it is the surest and sanest way of lessening the burdens of the courts. Some years ago a physician surprised his professional brethren by presenting to a lay audience some highly technical aspects of the science of medicine. It proved helpful to his hearers by banishing a great deal of mystery conjured by ignorance and by fortifying them against imposition. It proved helpful to his profession by demonstrating that "no science, however difficult to attain, has any mystery in its farthest researches or in its remotest principles," that the only lasting thing in the world is that which will stand the acid test of common-sense. So the hope of successful government lies in a popular understanding by the people of its genius and the spirit of the judicial department. Commenced

at the mother's knee, this education should be concluded at the grave. A guarantee against the wiles of self-seeking opportunists and their expediencies is a practical appreciation of the intentions of the founders of the government. That is all that America needs to assure the best results from government and a popular contentment. When the public undergoes the conviction that it is the sick body politic that needs law, just as it is the sick man that needs medicine, we will have gone a long way towards preventing both litigation and legislation by adopting measures of prevention. That principle has become the genius of the medical science, and it is applicable to jurisprudence. In this scientific effort the business man must turn for guidance to his lawyer and not to the self-seeking politician.

Mr. Madison said nearly a century and a half ago that "if a government be ever adopted in America, it must result from a fortunate coincidence of leading opinions and a general confidence of the people in those who recommend it" [Mad. Pap. 663]. Dean Roscoe Pound, of Harvard, said a few months ago (W. Va. Add.): "The lawyer of tomorrow must master the social sciences, must receive and grasp the ideas developed therein and must show us how to systematize and legalize them."

It seemed a few years ago to many wise and thoughtful men, without regard to their political inclinations—for there are no politics in the work of modernizing the courts—that the sun of the judicial department of government had become a puzzle as to direction. Strange expediencies, like the recall of judges and of judicial opinions, were but symptoms of obvious governmental troubles of operation which were beyond the diagnosis of the general public and the politicians. This serves to remind us that the character and spirit required to preserve the inherited structure of government must not be far inferior to that which conceived and made it. Government, like water, cannot rise higher than its source. Failure meant to the Constitution-makers a physical death with the halo of martyrdom; it means to this generation a spiritual death with the disgrace of unworthiness. Let it be understood that the scientific improvement of the judicial department of government and the maintenance of its high standards is not alone an economic measure, but one involving liberty and even life itself. It is to the nation what the heart is to the body. If one entertains a doubt of that, look upon Mexico as a present example of what the failure of the courts means and be convinced.

Now Lord Bacon tells us that "States are great energies moving slowly." So in the structure of the Federal government, our forefathers entrusted to posterity for *operation* a new and experimental engine, but constructed upon scientific principles. In their wisdom they provided against the vagaries, restlessness and unbridled spirits of mankind by carefully evolving and preparing a code of correlated, scientific rules and regulations by which it should be operated, that its structure might be safe from legislative change. To a business man, that is what the Constitution of the United States means, whatever other use may be made of it.

Unsatisfactory juridical conditions, therefore, are not necessarily the sign of a bad structure, or even of incompetent officials, but are symptoms of unscientific operation. Let us apply that thought. The legislative department, true to the prediction and fears of the fathers, is trying to manage and to direct the skilled men in the judicial department just *how* they shall do things instead of merely *what* they shall do. Those two words, "how" and "what," often spell success or failure. The courts, therefore, are on a level with the standard fixed by Congressional limitations instead of the ability and training of the judges and lawyers. *When an automaton is*

*made of a man, sawdust might as well be substituted for brains.*

There is needed also on the bench a recrudescence of John Marshall, with his broad, fearless, statesmanlike, judicial interpretation of the laws wherein was left small necessity for statutes. More dependence must be placed upon the courts and less on statutes. *That policy made and saved the structure of the government under John Marshall, and it ought to preserve it.* Court decisions must be grounded more upon the fundamental principles to be found in the maxims. However, until it can be had, and it is a matter of education, the nearest thing to it is believed to be a scientific commission regulation, which is far superior to regulation by a mass of rigid statutes. We shall presently discuss this thought, not upon principle but as a necessary expedient, until the courts shall again properly function.

The theme underlying the whole scheme of government is that the practical operation of the big structure would require the *personal* direction and supervision of *trained and experienced minds*. Like every inanimate thing, the injection of the human element is necessary to create motion and to give it life, and the result of the effort is measured by the quality, character and efficiency of this hu-

man element. The finest engine ever made would prove a failure in incompetent or indifferent hands or if not constantly kept in a state of efficiency. Now how did the Founders go about it? The Founders provided for and inspired the expert service by dividing all government into three parts—the “Executive,” the “Legislative” and the “Judicial.” The powers and duties of each of these departments were, of course, definitely fixed in the Constitution. It has been seen that a scrupulous observance of this careful division of power is a condition precedent to successful government, but it is well to quote Montesquieu, a great French political scientist, whose writings largely influenced the Constitution-makers and whose doctrines are accepted by every shade of respectable American politics. Said he:

“There is no liberty if the judiciary power be not separated from the legislative and executive \* \* \* There would be an end of everything were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions and of trying the causes of individuals.”

Let that thought be translated into the language of business. How long would a big factory maintain its efficiency if, indeed, it continued at all, if the engine-room men undertook to direct the operators of the machines or the board of directors undertook to define

the exact action of all the skilled employees? In fact, what need would there be for skilled employees at all? Now, applying this principle to the entire machinery of government, we find the legislative department, through the medium of hundreds of statutes, not only operating the courts, but actually defining human conduct itself. We are living in an age of statutory morals *when the eyes of the conscience that guided the course of the Fathers stand a chance of growing dim from lack of use.* The result is that the judges and lawyers have been blamed for wrongs that they had no power to prevent, being bound by Congress in statutory hoops of steel. There has come to pass the invasion of the judicial department feared by all the makers of the Constitution and the "Virginia Bill of Rights." The obvious end will be the destruction of the independence of the courts, "the greatest curse," said John Marshall, "that could befall a sinful and ungrateful people." *It need not be told to practical men that the power to regulate the manner of doing a thing is the power to fix the result.* Alexander Hamilton (Fed. Art. 78) said:

"The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution, I understand one which contains certain specified exceptions to the legislative authority \* \* \* Limitations of this kind can be preserved in practice in no other way than



through the mediums of the courts of justice. \* \* \* Without this, all the reservations of particular rights or privileges would amount to nothing. \* \* \* *Nor does this conclusion by any means suppose a superiority of the judicial over the legislative power. It only supposes that the power of the people is superior to both.*"

The Virginia Bill of Rights declares "that the legislative and executive powers of the State should be separate from the judiciary," and "that the members of the two first *may be restrained from oppression* by feeling and participating in the burdens of the people, they should at fixed periods be reduced to private station and return into that body from which they were originally taken." Now, consider how the Founders felt about the courts. It will be seen that they trusted the courts, that they recommended life-tenure for judges. Mr. Madison said if the government ever fell, it would be the result of legislative encroachment upon the judicial department. Gouverneur Morris pointed to the Aphori at Sparta that destroyed the bravest race of people that ever lived. Thomas Jefferson is the accepted tribune of the people, so let us again hear his views in a letter written December 23, 1791. The views entertained by this great democrat cannot be too often repeated to laymen. Said he:

"Render the judiciary respectable by every possible means to-wit, firm tenure in office, competent salaries and reduction of

their numbers. \* \* \* *This branch of the government will have the weight of the conflict on their hands because they will be the last appeal of reason."*

Again, in a letter written March 15, 1789, he said:

"In the arguments in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body which, if rendered independent and kept strictly to their own department, merits great confidence for their learning and integrity."

Again, in July, 1776, he wrote:

"The dignity and stability of government in all its branches, the morals of the people and every blessing of society depend so much upon an upright and skillful administration of justice that the judicial power ought to be distinct from both the legislative and executive, and independent of both, *so that it may be a check upon both.*

The whole program, as we have seen, is embraced in the one principle of an equable division of governmental power; that solved, the whole problem is solved, for then, and not until then, can the full benefits of the structure of government be had. In a sentence, this means that Congress must set the Supreme Court free. *That is all the trouble with the courts.* Now, to be concrete, the first and vital question is the *procedure*—the machinery—of the courts; the second is the personnel—the judge—and the third is a scientific supervision of *operation*. Of these, excepting the third, some brief thoughts have been expressed. Now it is important to be fully mind-

ful that a statute concerning procedure is just as binding as a statute concerning the substantive law, and the lawyer is sworn to uphold both. Manifestly he is forced to pick flaws and incidentally to retard justice. *That is one of the most wicked inventions ever conceived by Congress and legislatures to curse the ethics and moral standards of a helpless bench and bar.*

This leads us to consider the advantage of commission over legislative government in practical application. We have seen that the Founders, in order to assure independence of action and to inspire expert service, divided the government into three departments. Regulation of operation by scientific, highly trained, practical commissions is but an extension of that wholesome principle as well as increasing the effort of civilization for progress, efficiency, centralized responsibility and prevention of litigation. *It is the effort to apply business methods to the business of government.* The people are casting from their vision the veil of mystery and from the path of progress the hollow mockery of form. There is nothing novel in the thought of national government by expert commission regulation. Many years ago Congress, wearying of an infinite detail as to which it was in no position to deal, sensibly created the Interstate

Commerce Commission. Through this agency actual, practical and reasonable relief became possible in all transportation matters, without endless and expensive legislation and litigation. In effect it is in one a legislature, a court and a policeman as to certain practical matters. What is the result? Instead of plunging into the courts or running to Congress for relief, both the citizen and the common carrier simply set forth their grievance before the commission, which grants relief in accordance with the true right and common-sense. The Interstate Commerce Commission does things in months that would require of Congress as many years, and of the courts almost a lifetime and a fortune, if they were done at all.

One would have imagined that this splendid example would have inspired a similar regulation of *interstate corporate activity* long before abuses so clogged the courts as to become a positive menace. Eventually, some genius conceived the idea of sending a sort of expert trainer and regulator among the valuable and useful but too often wilful creatures of the legislatures. The viewpoint may be illumined by comparison. A corporation is very much like a horse—very valuable and useful under control, but a positive menace when vicious. Now the sensible thing is be-

ing done of taming and using the horse instead of killing and losing him. I venture to predict that it may require a few years, but far less time than was demanded by the Interstate Commerce Commission for a full realization of the usefulness and value of the Federal Trade Commission.

The principle of commission in lieu of statutory regulation and some sort of scientific superintendence must be applied to American judicature in all its aspects. The Federal Supreme Court, as has been shown, should prepare the scientific rules for the operation of the courts and the Congress will fix their jurisdiction, direct all fundamental matters and questions of permanent procedure and of evidence. Now, while these things complete the organization of the structure and its operation, we are still left without provision for a superintendence of the sacred work proposed to be performed and the maintenance of its efficiency. It is as if the board of directors had erected a factory and equipped it with machinery, plastered the walls with printed regulations and instructions, employed the necessary laborers, provided for their compensation and then had gone fishing. How may that difficulty be met?

Dean John H. Wigmore says there is needed "a chief judicial superintendent." This is

also the view of the American Judicature Society, another respectable authority. Endorsing the principle, but venturing to extend the agency, it is recommended that a "high judicial commission" shall be created by Congress, composed of ten men, to serve without pay, viz.: a justice of the Supreme Court of the United States, a United States circuit judge and a district judge, a State appellate judge, the Solicitor-General or the Attorney-General, two law teachers and four active, practicing lawyers. There should be bi-monthly meetings for personal conferences over reports and recommendations received and observations made during that period. The commission would examine into and receive from judges and lawyers reports upon the operation and results of all the courts and observe inefficiency and delinquency of all sorts. Suggestions in the light of existing law for correcting the difficulties would be made to the judges and bar associations and recommendations for all necessary additional statutes would be made to Congress and the State legislatures.

Using Dean Wigmore's illustration again—suppose a machine and its operator failed for five successive times before turning out an acceptable product. Would one stand by and theorize about it? Certainly not. One would

provide a suitable official supervision to correct the trouble (whatever it happened to be), and the prime thought would be to engage experts to do it. Indeed, it is difficult for a practical mind to comprehend such a negligent state of unpreparedness in any human effort. But above and beyond these things, manifest to all, the real work of the "high judicial commission" would be in perfecting American judicature along scientific lines. The time would come when the legislative department would feel obligated to their constituents not to pass any legislation concerning judicature until it had met the approval of the "high judicial commission," for legislators as at present constituted are as anxious as any one for expert advice.

Mention has been made of these commission measures as being preventive of *litigation*. *They are also preventive legislation*. Let me translate in figures the need of it. During a period of five years, and not including 1914, as many as 62,014 public statutes were enacted. that is an average of about one hundred and seventy laws a day, including Sunday. During a recent session of Congress seven hundred laws were enacted and about three thousand measures introduced. Estimating that Congress sits approximately two hundred working days, that means about three and one-half laws

a day actually passed and about fifteen to be considered by the legislators. Now let us translate into figures the crowded, overcrowded condition of the courts caused by the interpretation of these statutes. During the same period six hundred and thirty volumes of law reports were published. Other statistics have been given in a previous chapter, to which reference is made. We may illuminate the thought through a brief observation of the calendar of the highest court in the land. The United States Supreme Court is the most deliberative body within the conception of the mind of man and requires time for mature thought. Haste in its affairs is not conceivable. But it has its economic side as well as commerce, and its humanity may gradually respond to a public demand for dispatch at the cost of the wisdom that has saved and made this government. That condition presents the greatest menace to the life of this Republic. *Faith in and veneration for the Supreme Court is the cohesive power holding together the union of States.* It handed down 539 cases in one year. Let us turn on the microscope of analysis. Deducting Sundays and Saturdays and a thirty-day holiday, there are left only about 231 working days, which means nearly two and a half cases a day. Manifestly, the Supreme Court is physically



one of the hardest-worked bodies in America. This same condition applies to over half the Federal court dockets in the country, though the latter's congestion would be corrected largely by an assignment of judges to circuits where needed and the involuntary retirement of a few incapacitated ones, as is done in England and as officers are retired in the army and navy. If justice deferred is justice denied, here is work for the "high judicial commission" in evolving and making recommendations to the Congress, and it is believed that Congress will welcome the aid just as the President sought the advice of experts in time of stress.

## CHAPTER XI.

## "POLITICS THE ENEMY OF JUSTICE."

In a country where politics is often a vocation and necessary popularity is often purchased at the sacrifice of principle, it will be profitable to reflect upon the advice and fears of the Founders of the government in this respect, lest we forget a very sacred and continuing duty. The Virginia Bill of Rights declares "that no free government or the blessings of liberty can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality and virtue and by a frequent recurrence to fundamental principles." George Washington gave expression to the corollary to this proposition that "in proportion as the structure of government gives force to public opinion, it is essential that public opinion should be enlightened." Hon. Elihu Root, while president of the American Bar Association, in a communication to its members proposed a practical application. Said he:

"The people of our country are called upon to solve many new problems and to face new duties dependent upon conditions of which they are not fully informed and to make the most important decisions for which they require education and leadership of opinion. It is plain that the whole world has

entered upon a period of re-examination and development of political and judicial systems. \* \* \* In this juncture the highest duty of service to the country rests upon the Bar. Their knowledge, their training, their fitness to lead opinion, should be utilized to the utmost."

While we shall confine ourselves to American judicature, these two quotations and Mr. Root's letter aptly give expression to the three thoughts and the general theme of what is to follow. In them we have the thing to be done, the proper agency to achieve it and the fundamental principles that should guide in their accomplishment.

The belief is ventured that the greatest merit of the scheme of the American Republic is its ready response in every part to the actual and ever-changing needs of men. No other could have withstood a little over a century's increase in population of over a hundred million people and a corresponding increase in wealth, commerce, industry and temperamental changes without marked organic changes, if not successful revolution. Its elasticity, without the sacrifice of organic strength, is its featural merit. Said Dr. David Jayne Hill: "Instead of receiving law from the philosopher's study or a transcendental source claiming Divine authority, or from the throne of a Cæsar, it is accepted as a necessity arising from the nature and social needs of men." This means individual sacrifice and

individual participation. "Isolation," says Dr. Hill, "means death, and his whole existence depends upon a living relation to this human environment."

Conceding the perfection of this great machine, as all men do, there must not be lost sight of the human element entering into both its operation and effect. Manifestly a prompt and intelligent response to the demands upon a civilized people, whether of sacrifice or participation, depend upon an understanding of the general purpose and need requiring these things. The fall of every government, we are authoritatively told, is traceable to a lack of intelligent understanding and participation that eventually led to absolutism. This principle is reflected in the hysterical campaigns preceding political contests, but it is actually seen in the substance in the moderate, non-partisan efforts of the bench and bar. These efforts tend to direct the thoughts of the citizens to those simple, basic principles embraced by the framers of the Constitution and that have proved altogether acceptable and sufficient. Inasmuch as these good and wise men, as we shall see, recognized human nature as an important element with which to be reckoned not only in the citizen, but in those who operate the government, it is well that succeeding generations shall not ignore it.

Indeed, of the grave importance of bringing the general public into a closer relation with and a better understanding of the science of government and of the judicial department in particular, and its real independence of both the executive and legislative departments, there is no longer a question amongst thoughtful and observant men. There is a call to the lawyers as educators such as was never so earnest and insistent. An uneasy feeling concerning the effectiveness of the courts has had much to do with it. The legislative department, in the absence of accredited objection or the submission of matured programs, has gradually impinged upon the inherent and organic powers of the judicial department, as we have seen.

By this conduct we shall see that the legislative department has unwittingly and with the highest motives justified the fears of the wise and forward-looking framers of the Constitution. That the framers were conscious that the legislator's processes of reasoning differed from that of the judge and lawyer and citizen, and that his habit of mind underwent a change, sufficiently appears from their public expressions and from the Virginia Bill of Rights, where the constant return of the legislators to the body of the people is recommended. I would have it borne in mind that Mr.

Jefferson himself recommended life-tenure for judges and depended upon them to save the structure of government in both spirit and letter. However, for obvious reasons, organic preventive measures against legislative trespass were not feasible. Marshall said there were certain dangers inherent in human nature from which no protection could be had, except the genius of government, and that would be preserved by the courts. There can be no permanent provision against that indefinable, unaccountable, misdirected human equation that has destroyed governments, that has bankrupted commercial ventures, and which must be regulated as it arises. That is the function of education—of the creation of wholesome public sentiment. "When education has been neglected or improperly managed, we see the worst passions ruling with uncontrolled and incessant sway." The logic of what has been said is that the organized lawyers are the manifest, if not the sole, defenders and protectors of the powers of the judicial department as defined by the Constitution-makers. Now it is comforting to observe that in these efforts there is, with rare exceptions, assurance of intelligent Congressional co-operation in every duly accredited proposal. It must be remembered that, however slowly Congress has responded in the

past, there has been no organized plan involving fundamental principles, and Congress has gone along performing the Bar Association's duties as well as its own and as best it could. If it has become a habit, as seems to be the case, the lawyer cannot escape without censure. "In this juncture," Mr. Root warns you, "the highest duty of service to the country rests upon the bar."

It is well at this juncture to be concrete and indulge in a moment's review of American procedural history, both State and Federal, and recall its haphazard fashioning. Without any fixed plan, Congress has gradually given to America a juridical status that is admittedly without defense in reason or practice. The economics of it is, that commerce is turning to arbitration or to discouragement of litigation. The New York State Chamber of Commerce has an organized propaganda to that end, working in co-operation with the State Bar Association. The tragedy of it is that this condition is rapidly alienating the necessary respect and veneration of the people. We have shown that it has deprived the government of the valuable asset of the co-ordination and co-operation of the bench and bar by forcing the lawyers under their oath of qualification to pick flaws instead of facilitating the issue of fact to be tried. One cannot be un-

mindful of the fact that a procedural statute is as much law as one concerning substance, and equally binding upon the oath of qualification to uphold the law of the land. It has retarded the even flow of justice and has encouraged litigation for the sole purpose of delay. It has in some instances converted the certainty of justice into a gamble, and has required in Illinois as many as six trials in one case and the end is not yet. It is destructive of the spirit of uniformity in law, in its enforcement and in its interpretation. Last, but not least, it is rapidly involving a highly scientific element of government in needless technicalities and is plunging American judicature into practical politics. If they could speak to their children, what would the spirits of Washington, Jefferson, Madison, Wilson, Hamilton or Iredell say of the manner in which their sacred structure is being operated? We soon shall see some of the things they provided for and against, and repeat their predictions that the existence of this government depended upon the absolute independence of the judicial department. What, also, must be the mental attitude of a people who, as of right, expect a reasonable certainty of justice economically and speedily administered! There is no other excuse for the existence of government!



Inasmuch as it is and ever has been the worst offender against principles and the greatest enemy of justice, let us first consider the effect of politics, and we shall try to do our thinking in the spirit and much in the language of the good and wise men who conceived the structure of our government, for thereby we shall obey the mandate of the Virginia Bill of Rights, to recur to fundamental principles. Now one would hardly seek a more acceptable source than the welcome letters of John Adams to his friend, Thomas Jefferson, as they looked upon the progress of the thing that bore the impress of their very souls. Said Mr. Adams:

"Parties and factions will not suffer or permit improvements to be made. As soon as one man hints at an improvement, his rival opposes it. No sooner has one party discovered or invented an amelioration of the condition of man or the order of society than the opposite party belies it, misconstrues it, insults it and persecutes it."

Said George Washington in his farewell address:

"The common and continual mischiefs of the spirit of party are sufficient to make it the interest and the duty of a wise people to discourage and restrain it. It serves only to distract the public counsels and enfeeble the public administration.  
\* \* \* A fire not to be quenched, it demands a uniform vigilance to prevent its bursting into flame, lest instead of warming it should consume. In offering to you, my countrymen, these counsels of an old and affectionate friend, I dare not hope they will make the strong and lasting impression I could wish. But, if I may even flatter myself that they may be productive of some

partial benefit, some occasional good, that they now and then recur to moderate the fury of the party spirit \* \* \* to guard against the imposters of pretended patriotism, this will be a full recompense for the solicitude for your welfare by which they have been dictated."

Now Mr. Jefferson, during the pre-Convention days that put every citizen to the test, was doing some profound thinking and giving to the framers its full benefits. However, let us first quote a letter written in 1816, wherein he set forth the limitations of ancient law-makers and called upon America to profit by their failure. Said he: "They had just ideas of the value of personal liberty, *but none at all of the structure of government best calculated to preserve it.*" This renders very pertinent Mr. Jefferson's pre-Convention measure of the structure of government concerning the courts. In a letter written in July, 1776, to George Wythe, quoted in a previous chapter and worthy of reproduction, he said:

"The dignity and stability of government in all its branches, the morals of the people and every blessing of society depend so much upon an upright and skillful administration of justice that the judicial power ought to be distinct from both the legislative and executive, and *independent of both so that it may be a check upon both*, as both should be checks upon that—the judges, therefore, should always be men of learning and experience in the law, of exemplary morals, great patience, calmness and attention. Their minds should not be distracted with jarring interests; they should not be dependent upon any man, or body of men. To these ends they should hold their estates for life in their offices, or during good behavior, and then ascertained and established by law."

In a letter written from Paris in 1789 to George Wythe, and at this time the Federal Judiciary Bill was under discussion, he said:

"In the arguments in favor of a Declaration of Rights, you omit one which has great weight with me; *the legal check* which it puts into the hands of the judiciary. This is a body which, if rendered independent and kept strictly to their own department, merits great confidence for their learning and integrity."

Now it transpired that Mr. Jefferson lived to see his own sound theories applied to the actual operation of government at the hands of John Marshall and the firm establishment of the great principle that "it is the province and duty of the judicial department to say what the law is." Let no man read that letter, whatever might have been Mr. Jefferson's subsequent political hatred of him, and re-iterate that John Marshall did not in truth interpret fundamental principles and Mr. Jefferson's own views when he wrote the historic opinion in "*Marbury v. Madison*" [1 Cranch. 137 (U. S.), 2 L. ed. 60]. He logically applied the identical "legal check" commended by Mr. Jefferson and now praised by a proud and grateful nation without reference to political persuasion. As a matter of fact, Mr. Jefferson's subsequent political conduct fully vindicated his own warning and the prediction of Washington as to the uncertain and dangerous influence of politics upon the con-

duct of the courts. It is also an illustration that greatness does not alter humanity in politics and that the genius of government is the only hope of its stability, for the great and versatile Jefferson became the greatest political example.

But let us go a little further. In the modernization of the judicial department we have contended, therefore, that it should be reformed and subsequently directed by expert and non-partisan practitioners and judges. Mr. Madison, the protege of Mr. Jefferson, in a letter to Mr. Randolph, lays down our text and appropriately defines the lawyer's present duty. Said he [Mad. Pap. 663]:

"Whatever respect may be due to the rights of private judgment, and no man feels more of it than I do, there can be no doubt that there are subjects to which the capacities of the bulk of mankind are unequal, and on which they must and will be governed by those with whom they happen to have acquaintance and confidence. \* \* \* The great body of those who are for and against it must follow the judgment of others not their own."

Let us now trace further the history and evolution of the present Federal practice. The thought of conforming to the practice of each State, we are told by the Supreme Court [Bk. v. Halstead, 10 Wheat, 51-59, L. ed. 264, 265], was induced by the mistaken theory that "State systems then in actual operation, well known and understood, and the propriety

and expediency of adopting which they would well judge of and determine," would continue. There can be no doubt that "conformity" was also a political sop thrown to the States to lessen the violent local prejudice that actually refused their admission into some States. But so strong has the legislative habit grown that some legislators, but for their respect for public opinion, would amend the Ten Commandments. Constant, unscientific legislation finally created a condition that caused the Supreme Court to declare that "to conform to such statutes of a State would unnecessarily encumber the administration of the law as well as tend to defeat the ends of justice in the national tribunals." Thereupon followed both judicial and legislative amendments and rules with [Mexican Ry. Co. v. Pinckney, 149 U. S. 205, 7] an entire control of the procedure after the judgment is entered. Fifty odd notable exceptions to conformity have created a new and distinct body of unrelated procedure known as "Federal practice." To the average lawyer it is Sanskrit; to the experienced Federal practitioner it is a monopoly. To the author it is a golden harvest. At every Federal bar in this country a few lawyers that have undergone the labor and made the sacrifice of specializing in Federal procedure, necessarily monopo-

lize the practice in the Federal courts either originally or as associate counsel.

While objections to the proposed reform are rare, it will serve a purpose at this point to make reply to the few offered in Congress to the Bar Association's program. One was against any change in the Federal or State practice at all because some lawyers might be inconvenienced in having to learn a new system. This causes us to ask if *the lawyers have sunk so low in political estimation that it is thought that they would put their personal comfort or advantage, or even their lives, ahead of the sacred duty of assuring the certainty of justice*. It is hardly necessary to remark upon the inherited duty of defending and perfecting the government handed down to them by their forefathers. A failure of duty by the lawyers calls for criticism, it is true, but it does not deserve any such castigation as that. Viewing it in a lighter sense, it is as if one rebelled against the laws of sanitation because of the trouble of taking a bath. Let it be said that the bankers have accepted and are profiting by a complete reorganization of their department. Are the lawyers less patriotic and loyal and capable?

Another reason was that the small practitioner and the country lawyer could not afford to "learn" the new system for the few

cases he would command. The answer is that there will be nothing to "learn," but only directions to follow, as is the case in England. There will be no technicalities and no pitfalls to avoid. The rules will be scientific, but simple and practical, and almost free from *appealable* error. As is the case in England, there will be no further need of libraries of text books written by great scholars and jurists like Judge Rose and Mr. Foster. And it will serve a probative purpose to observe that one of two things is certain—either these books are needed or else the ablest lawyers and judges of America are being sadly deceived and the Supreme Court of the United States is guilty of untimely jesting.

Now we must consider a thing that the lawyers could afford to ignore in dignified silence, but that capital might be made of it. One distinguished Senator felt obliged to characterize the almost unanimous effort of the organized bar to return to ancient principles as being inspired by selfish motives—a desire for personal advantage because uniformity would enable a few lawyers to practice in all the courts. But for the respect in which men have held this Western Senator, the words placed in the mouth of Northumberland by Shakespeare would be appropriate: "See what a ready tongue suspicion

hath!" The earnest and unselfish efforts of Senators and Congressmen to properly solve this vital problem and their present co-operative spirit renders this unfortunate and isolated accusation painfully regrettable. Let us hope that the time is not far distant when the judicial department shall be unmolested in the application of science to juridical conditions. It stands to reason that a change to simplicity of procedure is against the interest of the expert Federal practitioner, for with a simple and uniform practice he will find the door of no court closed in his face.

And it is such an obvious thing that one does not have to be told that the organized program was instituted in the Federal courts from the profoundest reason and logic. First, the conceded failure of State conformity called for a substitute. The Federal government could not follow the States, so it was reasonable to give the States an opportunity to follow the Federal government. That State which tries to live unto itself will suffer if it does not perish. In spite of ourselves, we are all for one and one for all, as Dr. Hill scientifically demonstrated. Secondly, a simple, scientific, correlated system of rules such as would be prepared and promulgated by the Supreme Court of the United States would become a model that would, for reasons of con-



venience as well as of principle, be adopted by the States. This will prove a fourfold virtue—(1) the improvement of State procedure, (2) the adoption of court rules in lieu of a statutory procedure, (3) the possibility of State uniformity and (4) the foundation for fixed interstate judicial relations as permanent and correlated as interstate commercial relations. It is the only way that uniformity is possible and yet not compulsory, the psychology of which is important where State pride is an element.

There is another very material thought evidencing influence upon the independence and perfection of the courts, particularly in the West, which is being warped by the cancer of politics. Courts do not draw their power from the words of constitutions and statutes, but from a patriotic individual submission and respect that is the noblest attribute of American citizenship. We are not all born Americans, and thereby feel restrained or made patient by the beautiful sentiment of a birthright, so necessity and not altruism must set us to the task of education, which must not be left to the politician. Many there are who feel justification in doubting whether the true American spirit of the pioneers shall survive the "melting pot" of the many nationalities who evidence approval of our government

and American spirit by voluntarily becoming citizens. In this matter we are confronted by a condition and not a theory. The responsibility of revealing to these new citizens the genuine spirit of our institutions and of teaching them the distinction between liberty and license is knocking loudly at every citizen's door. The American national life does not permit of the flow of a gulf stream of foreign governmental and individual theories through its midst.

I would mention an old, old story as a vehicle to convey a new thought. God's covenant with Abraham was the promise that "in thee and in thy seed shall all the nations and families of the earth be blessed." Abraham left his country and kindred and went into strange lands to raise up a new people. Isaac was faithful to his birthright. But Esau, whose duty it was to keep the family covenant (Gen. 25-34), despised it and eventually bartered it in satisfaction of temporary appetite. He had no conception of the sacred obligation of an inherited duty and cared for nothing but the attraction of the present, for which he resorted to any expediency.

Some three hundred years ago the Patriots left their country and kindred and came into this strange America to raise up a new and mighty nation. Inspired by a love of liberty

and righteousness and individual independence, to them as sacred as Abraham's covenant with God, they left to their children the Constitution of the United States, that through it all the nations and families of the earth might be blessed. John Marshall, Virginia's greatest gift to the nation, preserved it in its perfect spirit and splendid glory. My appeal to this generation is that there shall be no Esaus in our midst to barter away that birthright for any temporary advantage.

## CHAPTER XII.

IS THE COMMON-LAW RELATION OF JUDGE  
AND JURY SUBJECT TO LEGISLA-  
TIVE CHANGE?\*

The usefulness of juries is like that of certain drugs, in that, when taken scientifically and in proper proportion to other medicinal agencies, they possess valuable preventive and curative properties; taken otherwise, they may become dangerous. Hence, the danger of im-

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\*The authorities on the constitutional question in this case have been fully presented to the Committee in the learned brief of Mr. Shelton, submitted to the sub-committee November 10 and 22, 1915.

Report of Hearing pursuant to S. Res. 552 (63d Cong., Third Session, p. 30). The hearing is entitled "Simplification of Judicial Procedure" and the brief is entitled

"Is the common law relation of judge and jury subject to legislative change?"

Beside the case of *Capital Traction Co. v. Hof*, 174 U. S. 1, cited on the hearing in which this brief is submitted, the other authorities are so fully collected by Mr. Shelton that it would be superfluous to add anything. They establish the proposition that under the Seventeenth Amendment parties in the Federal courts are entitled to a trial by jury, in which the judge assists the jury upon the facts as well as directs them upon the law.

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pairment of the juristic value of the jury, through a disturbance of the constitutional balance of power, may be as great as the destruction of it. This is a practical consideration as well as a scientific one, since it involves the sacrifice of the great common-law principles coeval with its creation and that recommended themselves to Hamilton, Jefferson, Ellsworth and Madison. Therefore, a people possessed of the noblest intentions, but trying to steer a course between the Charybdis of the whirlpool of demagogic flattery, passion and prejudice, and the Scylla of the eternal rock of principles, will do well, occasionally, to test their governmental compasses by the pioneer viewpoint, if not the spirit thereof. The trial by jury adopted and preserved by our ancestors was according to the course of the common law, and the perpetuation of those principles thereby becomes the most sacred obligation of good citizenship. When the American Republic was launched upon the governmental seas it was not without a charted course.

"The first Continental Congress, in the Declaration of Rights adopted October 14, 1774, unanimously resolved that 'the respective Colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, *according to the course of common law.*' 1 Jour. Cong. 28. The Ordinances of 1787 provided that the Northwest Territory should always be entitled to the benefit of the writ of habeas corpus and of the

trial by jury and of judicial proceedings, *according to the common law.* 1 Charters and Constitutions, 431." [*Capital Traction Co. v. Hof*, 174 U. S. 1, 6.]

According to the accepted theories of 1776 and of today, absolutism has no place in jurisprudence, for co-ordinated moderation, patriotism and profundity, alone, assure the greatest certainty of justice. In the words of Sir Matthew Hale, "as the jury assists the judge in determining the matter of fact, so the judge assists the jury in determining points of law, and also very much in investigating and enlightening the matter of fact, whereof the jury are the judges." Trial by jury is either a *right* or a *privilege*. If the former, and it is so expressed in the Constitution, it follows that its use cannot be dispensed with and, therefore, the only legislative question is the *manner of its use* or the measure of the participation of the jury.

The English rules at the present time—though not at the time of the adoption of the American Constitution—specify the issues where it may be demanded as a matter of right [*Jenks, Short History of English Law*, p. 369]; in America it is organically a right that must be expressly waived. In England and in the American Federal Courts, and in many State courts, its participation in the trial is subject to the "direction and superintend-

ence" of the judge. It has steadily followed one course in the Federal Courts—that of the common law of 1776. In some States its power is subject only to instructions in the law of the case, but with power in the judge to set aside a verdict given contrary to the evidence. In this instance the judge illogically "superintends and directs" afterwards, and not before the verdict. Whether this be a distinction, with or without a difference, is later to engage our thoughts. The power to set aside a verdict has been a right and a duty of the courts since "*attaints* began to be disused and new trials introduced in their stead," and is, therefore, as ancient as the jury itself. [*Blackstone, Bk. III, p. 375*].

Unmindful of its history and origin, there are iconoclasts, influenced by splendid sentimental impulses, so reckless as to wish to destroy centuries of established science, as embodied in the course of the common law, by taking away every limitation upon the jury and leaving it, instead of the judge, the directing genius of the trial, thereby permitting inexperience and human impulse to perform the sacred office of directing the administration of justice. This danger was foreseen by Blackstone, Sir Matthew Hale and other great statesmen, as we shall presently see. It is well to remark that England is probably a

country of the greatest possible individual freedom, yet her people have strictly maintained and strengthened the ancient ideals of direction by the judge and have abolished the jury *as a right* in many cases, particularly in simple commercial disputes.

In fixing a standard, it should never be forgotten that, when "trial by jury" was slowly developing into its maturity, England was passing through her darkest days and her people were sorely tried by capricious or wicked princes; that great legal giants, like Hale and Blackstone, always solicitous of individual rights, approved of it in the detail in which it was adopted in America, and that the pioneers embraced it and preserved it in that form, and not as it now is in England or France or in some of the American States. This is mentioned with the intention to impress the thought that no set of men, unless it were their English progenitors, could hope to be more watchful or more solicitous of the public welfare than those who framed the United States Constitution. No one could have greater reason for being suspiciously careful. They were not of a mind to adopt English institutions which they did not deem to be essential or believe to be perfect and with the genius of which they were not thoroughly familiar. There is not now, nor has



there ever been, the least suspicion that the makers of the Constitution were ignorant experimentalists or seekers after innovation. Their every act reflected the pioneer spirit of individual responsibility and character, instead of governmental regulation, and if one of their great institutions has gone wrong it is not the fault of the institution. There should be a correct diagnosis before a remedy is hazarded.

For so many years have the federal district judges "directed and superintended" the juries in their courts—to use the language of the Supreme Court of the United States [*Capital Traction Co. v. Hof*, 174 U. S. 1, 15, 43, L. Ed. 874, 878]—that that important feature of the trial by jury might, in any event, be looked upon as a fixture in American national jurisprudence. That the venerable custom has been abused, is not surprising to the student and observer of the past four decades of American political history and its effect upon the Federal Courts in certain sections of the country. That this unjudicial conduct is ceasing, as we shall endeavor to show, characterizes a new era in the Federal District Courts.

The power of "directing and superintending" the jury, as has been shown, is not a creature of statute or of the courts; nor is it a

thing "to be taken on and off" at the pleasure of the legislative department—it inheres in the thing itself. *It would not be a trial by jury, according to the course of the common law, without the exercise of the directing power by the judge.* The United States Supreme Court has said this in so many words. The custom came to America as an integral part of the common law trial by jury. The Seventh Amendment adopted it, as it was then in the common law, as a standard and a measure, and to that the litigant is entitled as a matter of constitutional right. A deprivation of an essential portion of a thing can be as disastrous as a taking of the whole. In principle, it is the same.

The jury is preserved in the American Constitution as the protector of the common people, and it has admirably fulfilled its purpose. Yet it is interesting to observe the authentic belief that it originated in the later Roman Empire as an expediency to serve the purpose of the prince; that it was adopted in England for no good end; that its growth was encouraged by the Crown, because of the notice of land ownership thereby obtained, and was accelerated by an unholy competition for business between two English courts—the Common Pleas and the King's Bench [*Jenks, Hist. Eng. Law, p. 47*]. Though recognized in

Sweden and Denmark and "all the Northern nations," and probably in Athens [*Blackstone, Bk. III, pp. 349-350*] its development to its present usefulness and yet unmeasured value is but a part of the wholesome evolution of meritorious British juristic institutions under the guidance of a studious and liberty-loving bench and bar and citizenship. The practice, in its full common-law flower, exists today in the American Federal courts, for in modern England trial by jury is no longer a matter of right, except in certain specific issues [*Jenks, Hist. Eng. Law, p. 369*].

Inasmuch as the viewpoint so often determines the light in which a thing is seen and so often influences the conclusion reached, a little philosophy may serve a useful purpose. It was a well-known judge of a juvenile court who wished to destroy the institution of matrimony, because it seemed to him that all the children were criminals and that parents were no longer able to discipline their offspring. His spiritual horizon had become contracted by the dimming of the sunlight of faith in humanity. So it has become that in political theory the jury is the power that withholds the "mailed fist" of the corrupt, partial or oppressive judge. But in political science and juridical practice it is, and ever should be, the practical aid to the competent judge in the

never-ending effort to find the evasive truth, and, furthermore, it is the means of exercising "the transcendent privilege that no man can be affected either in his property, his liberty or his person but by the unanimous consent of twelve of his neighbors and equals" [*Blackstone, Bk. III, p. 379*]. If all judges were competent or ordinarily just, Sir Matthew Hale's common-law system would continue to be ideal. The former is a questionable commentary upon the personnel selected as judges by the President and Senate, and evidences an obvious effort to avoid an evil consequence of indiscretion. The latter sets a high ethical mark and requires that it shall be attained by both the appointing power and the appointees, for they are equally responsible. It is the man that needs changing, if necessary, and not the thing preserved to their descendants by the pioneers. But there is a practical reason. The former makes of the judge a moderator and a mere figurehead, from which anomalous status many of our court troubles now arise, while the latter requires of him judicial temperament, juristic equipment and juridical training. As Dean Lile has said, the latter "makes of law more nearly a science and justice a certain measure."

In practical operation a trial should be two important co-operating agencies laboring to

the same end, according to their respective qualifications, and so mingling their common efforts in a harmony of purpose as largely to nullify the human limitations of both. Coordination, not rivalry, should prevail.

In the course of a carefully considered opinion in a case involving the validity of a waiver of jury trial, Mr. Justice Brewer said :

"In this, as in other respects, it (the Constitution) must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution.

"Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England. At the time of the adoption of the Federal Constitution it had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England, so that undoubtedly the framers of the Constituion were familiar with it" [*Schick v. U. S.*, 195 *U. S.* 65, 69, 49 *L. Ed.* 99, 102].

Previous to that time Mr. Justice White, in the case of *Knowlton v. Moon*, [178 *U. S.* 41, 95, 44 *L. Ed.* 991] had said :

"The necessities which gave birth to the Constitution, the controversies which preceded its formation and the conflicts of opinion which were settled by its adoption, may properly be taken into view for the purpose of tracing to its source any particular provision of the Constitution in order thereby to be enabled to correctly interpret its meaning."

#### WHAT BLACKSTONE SAID.

##### (1) *The Virtue of Trial by Jury.*

"The impartial administration of justice, which secures both our person and our properties, is the great end of civil society. But if that be entirely entrusted to the magistracy, a select body of men, and those generally selected by the prince or such as

enjoy the highest offices in the State, their decisions, in spite of their own integrity, will have frequently an involuntary bias towards those of their own rank and dignity; it is not to be expected from human nature, and *the few* should be always attentive to the interests and good of *the many*" [Blackstone, *Bk. III*, p. 379].

(2) *The Peril of Too Much Latitude.*

"On the other hand, if the power of judicature were placed at random in the hands of the multitude, their decisions would be wild and capricious, and a new rule of action would be every day established in our courts" [*Ibid.*]

(3) *The Judge Should Sum Up and Direct.*

"When the evidence is gone through on both sides, the judge, in the presence of the parties, the counsel and all others, sums up the whole to the jury; omitting all superfluous circumstances, observing wherein the main question and principal issue lies, stating what evidence has been given to support it, with such remarks as he thinks necessary for their direction, and giving them his opinion in matters of law arising upon that evidence" [*Ibid.*, p. 375].

Such is Mr. Blackstone's appreciation of the jury and of the judge. Such is his measure of their province, and such the Supreme Court of the United States has formally declared, as we have seen, is the exact thing intended to be preserved to the people in the Seventh Amendment to the Federal Constitution.

Now let us see how the federal courts have proceeded in applying this ancient doctrine.

"In the courts of the United States, as in those of England from which our practice is derived, the judge in submitting a case to the jury may, at his discretion, whenever he thinks it necessary to assist them, call their attention to parts of the evi-

dence he thinks important and express his opinion upon the facts; and the expression of such an opinion, when no rule of law is incorrectly stated and *all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on a writ of error.*"

So said Mr. Justice Gray in the case of Vicksburg R. Co. v. Putman [118 U. S. 545, 553, 30 L. Ed. 257]. Judge Sprague, of the Massachusetts District Court, in 1863, had said [*United States v. 1363 Bags of Merchandise*, 2 Sprague, 85, 88]:

"The trial by jury was, when the Constitution was adopted and for generations before that time had been here and in England, a trial of an issue of fact by twelve men under the *direction and guidance of the court. This direction and superintendence was an essential part of the trial.*"

Judge Sprague's views having been adopted by Mr. Justice Gray in 1899, in the case of Capital Traction Co. v. Hof [174 U. S. 1, 43 L. Ed. 874], a brief review of that case is in order.

The appellant's sole contention was that "there had not been a constitutional trial by jury." It had been proceeded against in tort by Hof before a justice of the peace to recover damages laid at \$300.00. The magistrate, upon request of plaintiff, Hof, empaneled a jury and went through all the accepted forms of a trial by jury, under authority of an Act of Congress to that effect. The case eventually reached the Federal Supreme Court on the

defendant's objection that "a trial before a justice of the peace with a jury was unknown at common law and was illegal and unconstitutional," as well as the plaintiff's contention "that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." A decision, responding to these two contentions, became impossible without the definition of the common-law jury, as preserved by the Seventh Amendment. In precise language it was given.

"Trial by jury," said the Court, "in the primary and usual sense of the term at the common law and in the American Constitution, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and empaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and *to advise them on the facts*, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence. This proposition has been so generally admitted and so seldom contested that there has been little occasion for its distinct assertion. Yet there are unequivocal statements yet to be found in the books.

"Lord Hale in his 'History of the Common Law,' touching trial by jury, said: 'Another excellency of this trial is this, that the judge is always present at the time of the evidence given in it. Herein he is able in matters of law emerging upon the evidence to direct them; and also, in matters of fact, to give them great light and assistance by his weighing the evidence before them and observing where the question and knot of the business lies; and by showing them his opinion, even in matters of fact, which is a great advantage and light to laymen. And thus, as the jury assists the judge in determining the matter of



*fact, so the judge assists the jury in determining points of law, also very much in investigating and enlightening the matter of fact, whereof the jury are the judges"* [*Capital Traction Co. v. Hof*, p. 874].

We come now to the consideration of another and an equally well-established element of trial by jury—the right of the judge to direct the verdict. The custom would seem to inhere in the juridical organization, albeit, its claim as a practice is not so great upon antiquity. It will prove convenient, for very obvious reasons, to review at the same time the decisions involving demurrer to the evidence, involuntary non-suits and the happy disappearance of the “scintilla doctrine.” Its history may be confined to its course in America, since the custom seems not to have been coeval with the erection of the courts, but is a subsequent juridical evolution. A peremptory direction, it is interesting to observe in connection with what has just been said and it is important that it be borne in mind, does not deprive one of a *constitutional* right preserved in the right to a trial by jury. It will appear later, however, that it has been held to be a legal right. We have contended that the right of the judge to sum up and superintend is organic, and we know that a jury of a number less than twelve and one sitting with a justice of the peace is a deprivation of a constitu-

tional right. So the pursuit of the course of the courts may be continued.

In *Treat Co. v. The Standard Steel & Iron Co.* [157 U. S. 674, 675, 39 L. Ed. 853, 854], Chief Justice Fuller said:

"The only ground relied on to sustain the jurisdiction of this Court is that the case 'involves the construction or application of the Constitution of the United States'; *because plaintiff in error was deprived of the right of trial by jury.* But it is well settled that where the trial judge is satisfied, upon the evidence, that the plaintiff is not entitled to recover, and that a verdict, if rendered for the plaintiff, must be set aside, the Court may instruct the jury to find for the defendant. *Grand Chute v. Winnegar*, 82 U. S. 355, 21 L. Ed. 170; *Marion v. Clark*, 94 U. S. 278, 24 L. Ed. 59; *Herbert v. Butler*, 97 U. S. 319, 24 L. Ed. 958. If the Court errs, as a matter of law, in so doing the remedy lies in a review in the appropriate court."

This would appear to be such an important element of judicial power as to inhere in the very organization of the courts and needful in maintaining a proper efficiency.

"The Court," says Mr. Cooley [*Cooley, Const. Lim., 6th Ed., p. 193*], sits to enforce the legislative will." Does it enforce it as a servant, as an agent, or as a co-ordinate power of equal dignity, is the question proposed to be answered. Said President Keith in the case of *Carter v. Commonwealth* [96 Va. 791, 816, 32 S. E. 780, 785]:

"In the courts created by the Constitution there is an inherent power of self-defense and self-preservation that this power may be regulated but cannot be destroyed, *or so far diminished as to be rendered ineffectual by legislative enactment*; that it is a

power necessarily resident in and to be exercised by the Court itself, and that the vice of an act which seeks to deprive courts of this inherent power is not cured by providing for its exercise by a jury. \* \* \* The history of this Court, and, indeed, of all courts of this Commonwealth, shows the jealous care with which they have ever defended and maintained the just authority and respect due to juries, an agency in the administration of justice, but our duty, as we conceive it, requires us not to be less firm in vindicating the rightful authority and power of the courts."

If directing a verdict, as we have just seen, does not impinge upon individual rights and guarantees, there will not be found those to seriously claim that it invades the legislative department. The department, at common law, never interfered with the detailed operation of the courts. It is only by modern statutes that it has been attempted.

It is provided in the Constitution that "the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may, from time to time, ordain and establish" [*U. S. Const., Art. III, Sec. 1*]. The synonyms of "power" are "potency" and "efficiency"; therefore, the obligation to see to it that judicial potency and efficiency are maintained is vested in the courts and not in the legislative department. This is a condition precedent to an independent departmental status, else the courts would become the mere tools of the legislative department.

"There is no liberty," said Montesquieu, "if the judiciary power be not separated from the legislative and executive. \* \* \* There would be an end of everything were the same man or the same body, whether of the noblest or of the people, to exercise those three powers—that of enacting law, that of individuals." [*Montesquieu, Spirit of the Laws, Bk. XI, Ch. 6*]. individuals" *Montesquieu, Spirit of the Laws, Bk. XI, Ch. 6*].

This great principle is eloquently expressed in the Virginia Bill of Rights, and is self-evident in the Federal Constitution.

The mischievous consequences of an improper personnel upon the bench, in specific instances, has provided a legislative excuse for encroaching upon the constitutional judicial province. Inasmuch as the Congress confirmed these objectionable selections and still leaves them to work their uncertain way, justification in fact cannot be demonstrated. The thoughtful citizen, and even the man in the street, is beginning to see the cause of the evil wrought by these things and, instead of the expediency of the recall, is demanding that Congress shall return to and the courts be operated upon first principles. There is a wholesome renaissance of the Montesquieu governmental theories that were the soul of the Bill of Rights and the spirit of the Constitution, a wholesome symptom of which is the retirement of code practice and the substitution therefor of scientific correlative rules made by the Court. A brief outline of the

course of the development of the practice, as nearly as may be, in the language of the courts, will now be undertaken.

Chief Justice Marshall, in 1828, in the case of *Elmore v. Grymes* [1 *Pet.* 469, 471, 7 *L. Ed.* 221, 226], said:

"The Court \* \* \* is of the opinion that the Circuit Court has no authority to order the peremptory non-suit against the will of the plaintiff. He had the right by law to a trial by jury and to have had the case submitted to them. He might agree to a non-suit, but if he did not so choose, the Court could not compel him to submit to it."

But Mr. Justice Johnson, who tried the case at *nisi prius* and failed to observe an organic distinction in the procedure, filed a spirited and well-reasoned minority opinion which, in effect, has become the law and custom and, therefore, commands equal consideration.

"I ordered," said he, "the plaintiff below to be non-suited because the evidence was so inadequate as not to maintain his suit; and had the jury found for him I would have set aside the verdict and ordered a new trial. The practice of the Court in which the cause comes up is this: when the plaintiff has closed his evidence the defendant is at liberty to move for a non-suit or to proceed with his testimony. If he introduces evidence, it is too late to move for a non-suit and the question always to be examined is, whether, upon the evidence introduced by the plaintiff admitting it to be true, the jury can find a verdict for him. So that it is, in fact, (1) a substitute for demurrer to evidence, or (2) a motion for instruction that plaintiff can not recover upon the case made out for him in evidence" [1 *Pet.* 469, 472, 7 *L. Ed.* 221, 227].

Mindful that an involuntary non-suit may not now be ordered, except when in conform-

ity to State practice [*U. S. v. Parker*, 120 *U. S.* 89, 95, 30 *L. Ed.* 604; *Gassman v. Jarvis*, 94 *Fed.* 603], let us turn to some later opinions of the court for a confirmation of the statement just made. And in order to discuss the evolution of the practice in the language of the Court, a departure from the chronological order is found convenient.

Mr. Justice Swayne in 1864 objected to certain instructions because,

"in effect, they took the case from the jury \* \* \* Where there is no dispute about the facts and the law arising upon them is conclusive against the right of the plaintiff to recover, it is proper for the Court to instruct the jury accordingly. *This is equivalent to a demurrer to the evidence*, and such an instruction ought to be given whenever the evidence is not legally sufficient to serve as the foundation of a verdict for the plaintiff" [*Schuchardt v. Allens*, 1 *Wall.* 359, 369, 17 *L. Ed.* 642].

In Mr. Justice Miller's opinion in *Pleasants v. Fant* [89 *U. S.* 116, 121, 22 *L. Ed.* 780, 783], it is said:

"In the case of *Parks v. Ross*, 11 *How.* 362, 13 *L. Ed.* 731 (1850), this Court held that the practice of granting an instruction like the present had *superseded the ancient practice of demurrer to evidence and that it answered the same purpose and should be tested by the same rules*; \* \* \* And in *Schuchardt v. Allens*, 1 *Wall.* 359, 17 *L. Ed.* 642, the case (*Parks v. Ross*) is referred to as establishing the doctrine that if the evidence be not sufficient to warrant a recovery, it is the duty of the Court to instruct the jury accordingly."

It is interesting to note that twenty-two years elapsed between *Elmore v. Grimes* and *Parks v. Ross*, and that the issue in the latter

case arose upon the motion of the defendant, "That if the evidence is believed by the jury to be true, the plaintiff is not entitled to recover." It is timely to quote the Court's exact language, as follows:

"It is undoubtedly the peculiar province of the jury to find all matters of fact, and of the Court to decide all questions of law arising thereon. But a jury has no right to assume the truth of any material fact, without some evidence legally sufficient to establish it. It is, therefore, *error in the Court to instruct the jury that they may find a material fact*, of which there is no evidence from which it may be legally inferred.

"Hence the practice of granting an instruction like the present, which makes it *imperative upon the jury to find a verdict for the defendant, and which has in many States superseded the ancient practice of a demurrer to evidence*. It answers the same purpose and should be tested by the same rules. A demurrer to evidence admits not only the fact stated therein, but also every conclusion which a jury might fairly or reasonably infer therefrom" [*Parks v. Ross*, 11 How. 362, 373, 13 L. Ed. 731].

Inasmuch as a comparison of the office of the ancient demurrer to the evidence with the modern practice of directing the verdict will be more effective in the light of the Supreme Court's measure of the former, it will be interesting at this point to take note of some old decisions. Said Chief Justice Marshall:

"The party demurring admits the truth of the testimony to which he demurs, and also those conclusions of fact which a jury may fairly draw from that testimony. Forced and violent inferences he does not admit, but the testimony is to be taken most strongly against him, and such conclusions as a jury might justifiably draw, the Court ought to draw" [*Pawling v. U. S.*, 4 Cr. 219, 221, 2 L. Ed. 601]

In the case of *Banks v. Smith* [24 U. S. 171, 179, 6 L. Ed. 443, 446], Mr. Justice Thompson said:

"By this demurrer the defendant has taken the questions of fact from the jury, where they properly belong, and has substituted the Court in the place of the jury, and everything which the jury could reasonably infer from the evidence demurred to is to be considered as admitted. The language of the adjudged case on this subject is very strong to show that the Court will be extremely liberal in their inferences where the party demurring will take the question from the proper tribunal. It is a course of practice, generally speaking, that is not calculated to promote the ends of justice."

Thus the price of a demurrer to the evidence, proved a heavy handicap to the party disputing the legal effect of the evidence. He purchased immunity from the hazard of the jury by risking the result of the case upon his knowledge of the law *and the sacrifice of the right to dispute anything the plaintiff might choose to testify*, regardless of the real facts. The former was probably justified, but the latter seems not to have been believed to be within the pale of reason or moderation, or in the interest of a helpless laity. That it was too unreasonable to hold a place within the juridical organization in England or America, subsequent history has demonstrated. A great teacher (Charles A. Graves, University of Virginia) advised against its use, except "in the defense of an action by a poor widow against a railroad corporation for the killing



of her only cow." Without agreeing with his mode of procedure, we turn for vindication to the prophetic reasoning of Mr. Justice Johnson's dissenting opinion in *Elmore v. Grimes*, for "the stone which the builders rejected is become the head of the corner" of the Federal juridical structure.

"In practice it subserved the purposes of justice under our system as effectually as a bill of exceptions, or a demurrer to evidence, and *in several* respects better. (1) It saves the practitioner from the weight of responsibility, which often results from being compelled to elect between a voluntary non-suit and a demurrer to evidence, or a bill of exceptions, which may terminate fatally to his clients; and (2) it not unfrequently saves his client from the fatal effects of negligence and misapprehension, either of himself or his attorney; or (3) from surprise. (4) In point of convenience and expedition in the administration of justice, I presume there cannot be two opinions" [*1 Pet.* 469, 473, 7 *L. Ed.* 221, 228].

Let us now follow briefly the growth of this suggestion and see it develop into the full flower, wherein will be found every principle announced by Mr. Justice Thomson, but without violating an organic right.

In 1874 careless counsel for the defendant, after plaintiff had rested, untechnically moved the Court "to decide that the evidence was not sufficient to entitle the plaintiff to a verdict." In discussing this motion the Court said:

"Suppose the motion is regarded as a motion for a non-suit, it was clearly one which could not be granted, as it is well settled that the Circuit Court does not possess the power to order a peremptory non-suit against the will of the plaintiff. *Elmore*

v. Grimes, 1 Pet. 469; Castle v. Bullard, 64 U. S. 172, 16 L. Ed. 424. \* \* \* but the defendant may, if he sees fit, at the close of the plaintiff's case, move the Court to instruct the jury that the evidence introduced by the plaintiff is not sufficient to warrant the jury in finding a verdict in his favor, and it is held that such a motion is not one addressed to the discretion of the Court, but that it *presents a question of law*, and that it is as much the subject of exceptions as any other ruling of the Court in the course of the trial. Schuchhardt v. Allen, 68 U. S. 370, 17 L. Ed. 646; Parks v. Ross, 11 How. 362, 13 L. Ed. 731; Bliven v. New England Co., 64 U. S. 433, 16 L. Ed. 514. All things considered, the Court is inclined, not without some hesitation, to regard the motion as one of the latter character" [*Mercantile Co. v. Folsom*, 85 U. S. 237, 250, 21 L. Ed. 827, 833].

Parks v. Ross was decided in 1850. Mr. Justice Gray, in 1883, concisely sums up the doctrine and refers to English (we will not call it common law) authority:

"It has been recently decided by the House of Lords, upon careful consideration of the previous cases in England, that it is for the judge to say whether any facts have been established by sufficient evidence, from which negligence can be reasonably and legitimately inferred, and it is for the jury to say whether from these facts, when submitted to them, negligence ought to be inferred. R. Co. v. Jackson, 3 App. Cas. 193" [*Randall v. B. & O R. Co.*, 109. U. S. 478, 482, 27 L. Ed. 1005].

That this research made by the House of Lords was satisfactory to the Supreme Court of the United States, closes discussion that the practice in 1883 and prior thereto was a fixture in English jurisprudence. The Court had already said:

"It is the settled law of this Court that when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the

plaintiff so that such a verdict, if returned, must be set aside, *the Court is not bound to submit the case to the jury*, but may direct a verdict for the defendant."

Mr. Justice Miller had previously said:

"But we are pressed with the proposition that it was for the jury to decide this question, because the testimony received and offered had some *tendency* to establish a participation in the profits and the question of liability under such circumstances should have been submitted to them, with such declaration of what constitutes partnership as would enable them to decide correctly. No doubt there are decisions to be found which go a long way to hold that if there is the *slightest tendency in any part of the evidence* to support the plaintiff's case, it must be submitted to the jury, and in the present case, if the Court had so submitted it, with proper instructions, it would be difficult to say that it would have been an error of which the defendant could have complained here. But, as was said by the Court in the case of *The Improvement Co. v. Munson*, 81 U. S. 448, 20 L. Ed. 872, recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury *can properly proceed to find a verdict* for the party producing it, upon whom the onus of proof is imposed. The English cases there cited fully sustain the proposition. *Jewell v. Parr*, 13 C. B. 916; *Toomey v. L. & B. R. Co.*, 3 C. B. (N. S.), 146; *Ryder v. Wombell*, 4 L. R. Exch. 33" [*Pleasant v. Fant*, 89 U. S. 116, 120, 22 L. Ed. 780, 781].

Chief Justice Taney had already said:

"It is clearly error in a court to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered, as such an instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the fact hypothetically assumed in the charge of the court, and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to a correct conclusion, but its tendency is to embarrass and mislead them" [*U. S. v. Breitling*, 61 U. S. 252, 254, 15 L. Ed. 902].

And Mr. Justice Clifford had used the following language in a carefully considered opinion:

"When a prayer for instruction is presented to the Court and there is no evidence in the case for the consideration of the jury, it ought always to be withheld; and as a general rule, if it is given under such circumstances, it will be error in the court for the reason that its tendency may be, and often is, to mislead the jury by withdrawing their attention from the legitimate points of inquiry involved in the issue" [*Goodman v. Simonds*, 61 U. S. 343, 359, 15 L. Ed. 938].

## RELATION OF JUDGE AND JURY EXACTLY DEFINED.

### (1) *Prevention of Unjust Verdicts.*

"It is the duty of a court, in its relation to the jury, to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse or passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial" [*Mr. Justice Miller, in Pleasants v. Fant*, 89 U. S. 116, 121].

### (2) *How It Is Done.*

"This is done (a) by making plain to them the issues they are to try (b) by admitting only such evidence as is proper in these issues, and rejecting all else (c) by instructing them in the rules of law by which that evidence is to be examined and applied, and finally, when necessary, (d) by setting aside a verdict which is unsupported by evidence or contrary to law" [*Ibid*].

### (3) *How Court Examines the Evidence.*

"In the discharge of this duty it is the province of the Court, either before or after the verdict, (a) to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. (b) *Not whether on all the evidence the preponderating weight is in his favor*; (c) that is the business of the jury; (d) but, conceding to all the evidence offered the greatest probative force which according to the law of evidence it is fairly entitled to, (e) is it sufficient to justify a verdict? (f) If

it does not, then it is the duty of the Court, after a verdict, to set it aside and grant a new trial" [*Ibid*, p. 122].

(4) *When Submission Is an Idle Ceremony.*

"(a) Must the Court go through the idle ceremony, in such a case, of submitting to the jury the testimony on which plaintiff relied, (b) when it is clear to the judicial mind that if the jury should find a verdict in favor of plaintiff that verdict would be set aside and a new trial had?" [*Ibid*].

(5) *The True Principle.*

"Such a proposition is absurd, and, accordingly, we hold the true principle to be that if the Court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is sufficient to warrant a verdict for the plaintiff, the Court should say so to the jury" [*Ibid*].

(6) *Plaintiff's Recourse Ample and Appropriate.*

"In such case the party can (a) submit to a non-suit and try his case again if he can strengthen it, except where local law forbids a non-suit at that state of the trial, or (b) if he has done his best he must abide the judgment of the Court (c) subject to a right of review, whether he has made such a case as ought to be submitted to the jury; in such a case a jury might justifiably find for him a verdict" [*Ibid*].

Thus, in a brief history of the evolution of the practice of directing the verdict, the great experts who compose the Supreme Court and who were selected on account of their peculiar ability and preparedness have been allowed to explain a venerable custom of the courts by presenting their reasons. Every liberty-loving man will do well to profit by their example, observation and vast experience, lest there be sacrificed the great common-law principle composing the warp and woof of the Constitution. It is not believed that there are

any who are willing to contest their wisdom and none who would sacrifice their handiwork in order to prevent or to revenge isolated cases of individual wrongdoing.

A review of these two important juridical elements, as persuasive as is their merit, ancient origin, manner of adoption and successful operation, would be incomplete without a further consideration of an important practical organic feature. Inasmuch as it tends reasonably to recognize the manifest responsibility and duty of a co-ordinate branch of the government and, to that extent, bring about an apparent legislative concession, it addresses itself to a sound individual discretion, a knowledge of the science of government, a broad statesmanship and an unselfish patriotism, that has not been and will not be found wanting in the halls of Congress. And we are led up to the splendid thought that, amongst the three major departments, co-ordination and not jealousy nor peevish interference is the keynote of successful government; that it is impossible for the courts to operate scientifically unless they are able to put into effect rules that are recommended by observation and experience, drawn from actual operation. This is an inherent part of the Constitutional power (efficiency) they must exercise without molestation.

## CHAPTER XIII.

## AN EFFICIENT JUDICIAL SYSTEM.

We may now with broader appreciation venture to bring under review some suggestions believed to be helpful in the program of modernization. It will also serve a useful preliminary purpose to review some statistical results of present judicial conditions. It is well to be mindful that all but Florida, Maryland, Michigan, Mississippi, Illinois and West Virginia have abandoned the anachronism of common-law pleading. Virginia took the necessary step in 1916, but the rules have not yet been put into effect. Vermont and New Hampshire, and recently New Jersey and Colorado have authorized or have adopted court rules. The other States are merely piling up statutes to suit the individual legislative fancy. There is no principle involved. The Admiralty, the Bankrupt, the Federal Equity courts and all Federal tribunals now operate under rules of court. In the year 1893, in 13,930 cases tried by the appellate courts for a given period, 14,447, or over 48 per cent. of the points decided concerned practice alone, and never touched the merits. In January, February and March, 1910, out of a

total of 5,927 cases tried, 22,988 points were considered. Of these 12,259 involved points of practice, which means that 53.32 per cent. of the time of the courts was actually thrown away in ascertaining whether the machinery of the courts had been used in the exact technical manner prescribed by Congress and the legislatures. It was an increase of 5.07 per cent. over the previous year. The Mississippi court during these three months, in deciding 56 cases, passed upon 97 points, of which 52 were questions of practice, which is 53.6 per cent. of practice and an increase of 10.6 per cent. The Virginia court during the same period, in deciding 50 cases, passed upon 244 points, of which 137 were questions of practice, a proportion of 56.1 per cent. and an increase of 4.1 per cent. During the same period the New York court, in deciding 888 cases, passed upon 2,855 points; 1,453 were questions of practice, a proportion of 51.2 per cent. and an increase of 8.2 per cent. Could any business concern succeed with such a ratio of useless expense, and can the business men of this country afford to rest longer under this senseless and extravagant condition? But so much for the machinery of the courts. Let us consider the dockets that have been congested by this cumbersome procedure.



At the beginning of the October term, 1904, of the Supreme Court of the United States there were 282 cases brought over from the past term and 400 new cases added, making a total of 682 cases. Of these 402 cases were disposed of during the term, leaving untouched 280, or just 2 cases less than that with which it started the term. Passing over the eight intervening years, it found awaiting it in October, 1913, a docket of 604 cases carried over from 1912, to which were added 524 new cases, making a total of 1,128. The Court was able, by the hardest work ever performed by any group of men, to dispose of 593 cases, leaving 535 on the docket to be carried over to further crowd the October, 1914, docket. The number of cases disposed of in 1913 was nearly double the entire docket of the year 1904, and reflects the increase in litigation in the Federal Supreme Court. Much of this is epoch-making and calls for the supreme genius, learning, patience, research, deliberation and physical power possessed by these great and able jurists. The Court's annual average for ten years has been 463 cases, and about 550 is the present annual addition of new cases. Assuming that the Court will average 600 cases a year and that 550 new cases will be added, there will be an annual gain of 50 cases on the docket. At that

rate it would be able to catch up with its docket on the 1st day of October, 1925. But one must not be unmindful of the fact that either side may now invoke the aid of the court in constitutional matters [Attorney-General's Report, 1914, p. 56].

The solution of the trouble, without additions to the membership, is not so difficult if Congress can be induced to act. President Taft recommended that there should be taken away from the Supreme Court all questions which do not involve as a genuine issue the construction of the Constitution, and by limiting the duty of the court to hear any other cases than those which upon a writ of *certiorari* the Court, in its discretion, draws to its jurisdiction [Address, American Bar Asso., 1913]. Appeals from the island territories could be divided between two circuit courts of appeals—one on the Pacific and one on the Atlantic. There are meritorious bills pending in Congress that tend to restrict the right of appeal in copyright and bankrupt cases, except upon *certiorari*. These will considerably shorten the docket and assure justifiable hearings. There are other bills for the reduction of costs.

Is Congress fully sensible of the country's obligations to the Supreme Court and the earnest desire to sustain and preserve it in its

glory and power? Let us repeat what heretofore has been said. It is the one stable element in the composition of the government. The manner of doing things change, but principles live forever. That is the secret of the strength of this Republic. No political storm can sway it from its course, for there is a competent pilot at the helm. The Supreme Court nurtured the nation in its infancy, trained it in its youth, and is now guiding it in the straight and narrow way in its maturity. It has been to the nation a pillar of fire by night; it has guided destructive revolutionary doctrines into beneficial evolutions; the violence of anarchy and the persuasiveness of the demagogue have fitted themselves into the constitutional mold; the oppression of concentrated power and the chicanery of corrupt organizations have ceased to trouble and alarm, at its simple word. It is the final arbiter between man and his brother, the state and the church, the citizen and the soldier, between political parties, and even between Congress and the Chief Executive himself. There abides in the people of the United States a sublime faith in their highest Tribunal that makes of submission the noblest attribute of national character. Could a greater calamity befall the nation than a weakening of its be-

neficient power and the faith of a grateful people?

In the inferior courts the condition of business is more or less congested in all parts of the country. As we write, this is particularly true in the Second, Fifth, Eighth and Ninth circuits. In the entire Federal system of nine circuits there are thirty-two circuit and ninety-four district judges. Several circuit and district judges are not physically capable of doing anything like full work. Eight of the thirty-two circuit judges and six of the district judges are at this time over the age of sixty-seven. Now, putting aside all other thoughts, one would fancy that if Congress felt disinclined to retire these judges or to provide assistants, it would relieve the congested districts by assigning judges from other districts possessing light dockets. This possesses the merit of good business, since the congestion in any circuit could be obviated without the necessity of appointing additional judges, and full time thus would be had from serviceable judges without additional salary expense. So economy was not the motive for Congressional inaction. Just what perversity caused the Sixty-third Congress [Chap. 48, p. 203, 1st Sess., 63d Cong.] to allow this to be done nowhere except in New York (Second district), the Credit Men's Association of Amer-

ica is trying to ascertain. Certainly, what is good policy for the Second circuit ought to be good policy for the rest of the country.

Manifestly the whole judicial system must and will be made as elastic as possible, and both circuit and district judges become subject to assignment outside of their respective circuits. This will serve the further purpose of a model system that will eventually be followed by the States, for we are entering upon an era of reason in the law and its enforcement, and the yielding of Congress is inevitable. As it is, a circuit judge cannot sit outside of his circuit, with the exception of the Second circuit, and district judges, while subject to assignment in their own circuits, cannot be assigned outside, except in a very limited class of cases and as to the Second district. The apparent intention of the new "judicial code" to do away with this obstacle has not been deemed clearly enough expressed to justify its application. The "judicial code," therefore, should undergo such amendments as to make this power clear. A deferred decision is oftener a worse evil than a wrong one, and the certainty of prompt decisions would prevent much litigation.

But if Congress and the legislatures cannot find time and disposition to relieve the judicial department, it has undoubtedly found

time to burden it. During the past five years, and not including 1914, as many as 62,014 public statutes were enacted. During the last session of Congress 700 laws were enacted and about 3,000 measures introduced. During the same period 630 volumes of law reports were published, not including those of the Interstate Commerce Commission. The Federal Trade Commission has now commenced to add to the number. In one day in 1914 the Federal Supreme Court handed down sufficient opinions to fill a volume. Two small volumes hold the life's work of John Marshall!

Yet, with this phenomenal increase in statutes and litigation, there ought now to be few judicial evils, with a proper personnel, an elastic system of assignments and a modernized procedure. A Federal court *regime* that need not be characterized is passing. So the necessary reforms ought not to be difficult of achievement by an organized bar, with the aid of such an intelligent and unpartisan sentiment as is now supporting it. It is unhesitatingly said that *a political appointment upon the bench is the lowest order of treason*. Public sentiment is turning to the defeat of the offending appointing power, instead of the "recall" of his incompetent creatures. The public has learned more about the working of the judicial department and of certain distinc-

tions that should be drawn, during the past six years than during the previous years of the national life. This country, and the South in particular, after resignedly struggling for fifty years under some unsympathetic Federal judges, in many instances helplessly observing the squandering of the assets of litigants, suddenly realized that a voluntary and unexpected Moses had set their faces once more towards the promised land of their fathers. This one man, Judge Taft, whom I have previously mentioned, did more and sacrificed more to destroy the evil and to fix for the Federal bench a new and high standard for the future than any other, living or dead.

Since the beginning of the world the power to appoint to office has contained the germ of dissatisfaction and, oftentimes, destruction. In Genesis (41:13) it is said: "*Me*, he restored unto mine office, and *him*, he hanged." Jefferson declared that every political appointment brought him more enemies than friends. President Wilson's wholesome declaration that the time of the Chief Executive should be otherwise employed is fresh in the public mind. How much more important it is that the judges should be free from this vexing conflict and burden, from the political intrigues leading to selections, and from the partisan spirit and power that is its concomi-

tant. Yet it has become common for legislatures to create offices to be filled by judges. The recommendation of President Taft that Federal judges be deprived of the power of naming court clerks and receivers and fixing honorariums has long been approved by the leaders of the bar and is taking a strong hold upon the public. District Judge Rose, of Baltimore, one of the new *regime*, has consistently required a bill of particulars of the service claimed and the approval of all fee allowances by two disinterested lawyers. His recent opinion in "Indra Line v. Palmetto Co., 239 Fed. 94, 6," will inspire reflection. Relief from administrative duties is a removal from temptation and cause for criticism.

The prediction is made that Montesquieu's theory of differentiating the enforcement of commercial law will eventually prevail in practical America. Dividing litigation into two classes, he said: "The affairs of commerce are but little susceptible of formalities. They are the actions of a day, and are every day followed by others of the same nature. Hence it becomes necessary that every day they should be decided. It is otherwise with those actions of life which have a principal influence on futurity, but rarely happen" [Spirit of the Laws, Bk. 20, chap. 18]. Those of us



who believe that facility in commercial litigation has characterized the administration of the common law will do well to disillusion ourselves with the assistance of Coke (pt. 4, chap. 60) and Blackstone [Com. Bk. 3, chap. 4, p. 32; 88 Vic., 1884]. Usurpation by the King's Bench has produced destruction of its simplicity and economy and enveloped its enforcement in the mystery of technical procedure and the cost of delay. The law merchant has been gradually drawn into the channels of general litigation, when it would have been better administered under the theory of the courts of Piepoudre or "Piepowder," so called by Coke because "justice is there done as speedily as dust can fall from the foot." It is based upon the same principle that justice was administered among the Jews in the gate of the city, with the attendant publicity. The story, reason and operation of those simple forms supply in a degree a *raison d'être* for the grander and more dignified twentieth-century Federal Trade Commission [Jenks, Hist. Eng. Law, pp. 40, 75; Select Cases, Law Merchant, Selden Soc.].

The difficulty in obtaining a proper personnel for jury service is not caused so much by the time of the citizen that is *consumed* as the time that is *wasted* while legal points are being discussed. The most of these would be-

come evident and be settled before the trial begins if the pleadings made up exact issues of fact, followed by (1) a complete denial, (2) a modified denial, or (3) an admission, instead of presumptions of fact and law. The difficulties of relevancy and materiality and length of testimony would also be decreased, if not obviated, and an intelligent verdict would be more certain. The danger of instructions would be reduced by half.

What about the mechanics of the law, and shall we consider seriously only the Federal Congress, and that as to but one instance? That is quite enough. It might well have been the Federal Supreme Court instead of Job, who cried out in his travail, "Who is this that wrappeth up sentences in unskilled words!" In a very recent case [U. S., *use of Alexander Bryant Co., v. N. Y. Steam Fitting Co.* (Dec. 7th, 1914), 235 U. S. 327, 59 Led. —35 Sup. Ct. Rep. 108], it casually remarked of the "public contract statute" that "the act of Congress is undoubtedly ambiguous. Indeed, considering the latter only of the three provisos with which we are concerned, they absolutely repel accommodation \* \* \*. We must try, however, to give coherence to them and accomplish the intention of Congress." The court quoted another sentence and declared that "this seemingly brings us to an

*impasse.*" It then resignedly concluded: "We can only select those which we consider the fittest to prevail to accomplish the purposes of the statute." And so by these means the judicial department assisted Congress to conduct the legislative department and the Constitution was saved! Is there anything more obvious than the necessity for a Congressional reference bureau presided over by some capable, deliberate and profoundly educated thinker?

Is the selection of judges receiving sufficient or proper, or, in fact, any scientific attention? So great is the personal equation in all human endeavors that a disregard of it spells failure. Every available means of enlightenment should be exhausted in the selection. That inspires the question as to who is best qualified to select a judge from amongst lawyers? It is the practicing lawyers who know his habit of mind, his temperament, his measure of civic duty, his estimate of fundamental principles and his ethical viewpoint. Be sure that every member of the bar has his measure of profundity, moderation, education, morality and ethics, and that it is as well known among his brethren as is his name and residence. Is it prudence or wisdom to disregard this important element? The difficulty of selection was profoundly considered by the Constitu-

tional Convention and its dangers earnestly argued. Virginia and North Carolina and Pennsylvania stood together in the debates and voting. Jefferson spoke and subsequently (October 31, 1823) wrote: "With us all the branches of government are elective by the people themselves, except the judiciary, of whose science and qualification they are not competent judges." There was finally a compromise by which the unity in the Executive proposed by Wilson, of Pennsylvania, was modified by Madison's recommendation for confirmation by the Senate.

The country has grown to immense proportions and consequence, and the selection of judges has become correspondingly more difficult. No one man can know all eligible candidates and no man's advisors can know them. The problem is to secure the best men as much as to avoid the bad ones. I venture to suggest that a sort of process of elimination would work well in selecting the Federal judiciary. Out of a class composed of two or three persons from each State a selection, based upon location and fitness, would be made. The selection of circuit and district judges would merely be confined to their respective circuits or districts. This thought must not be confused with recommendation by petition. Petitions never meant anything serious and ought

to be ignored in such a sacred duty. There must be translated the profound judgment of districts and circuits and States through the formal expression of the individual lawyers. The State and local bar associations would attend to that practical matter. There is almost a certainty that State competition would insure the presentation of the very ablest men. That the lawyers would measure up to their sacred task is not for a moment to be questioned, but there is always the protection that these recommendations would be merely earnest suggestions to an equally earnest appointing power.

After having placed the machinery of the courts on a scientific, practical basis, the next thought is to assure this status by providing a scientific superintendence of operation and development. In another chapter and reference as there made for details, it was recommended that a commission shall be created by Congress to serve without pay, composed of ten men, viz.: a justice of the Supreme Court of the United States, a United States Circuit and District judge, a State Appellate judge, the Solicitor-General or the Attorney-General, two law teachers and four practicing lawyers. It is manifest that such an official scientific supervision would serve a wholesome and useful purpose.

As well as to the personnel and the machinery, attention ought to be given by the bar to the merely relative nature and value of the externals of judicature, and particularly those connected with the courtroom. There is agreement that laymen are contracting the habit of mind that the processes of justice are not the solemn thing of the Hebrew law, of the Christian religion and of the inclination of the conscience. Now the atmosphere of the courtroom often justifies that dangerous tendency. Without being one of those who believe that mere form or convention could add to virtue, it may be observed that virtue does not parade without suitable habiliments. Inasmuch as justice is the handmaiden of religion and the foundation upon which civilization and self-respect are erected, one will not go far afield in keeping them in close association. The conduct and appearance and bearing and language of a judge in court is not, therefore, so much an individual matter as it is of State importance. Circumstances of necessity separate him in society from his fellows of the bar with whom he was so lately upon terms of easy and confidential intimacy. This necessary isolation could be well characterized by a suitable standard habiliment which, without doing violence to the severest democratic tastes, would dignify the noble and sacred

cause of justice by suggestion, if not by merit.

Mr. Blackstone's condemnation of depositions, spoken more than a century ago, might have been written for the benefit of this generation, as they will be profitably read by generations yet unborn. The American lawyer cannot perform a more patriotic service than in seeing to the enforcement of principles considered by him of first importance. Said he [Bk. 3, p. 374]: "The open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth than the private secret examination taken down in writing before an officer or his clerk in the ecclesiastical courts and all others that have borrowed their practice from the civil law, where a witness may frequently depose that in private which he will be ashamed to testify in a public and solemn tribunal. There an artful or careless scribe may make a witness speak what he never meant, by dressing up his depositions in his own forms and language; but he is here at liberty to correct and explain his meaning, if misunderstood, which he can never do after a written deposition is taken. Besides, the occasional questions of the judge, the jury and the counsel, propounded to the witness on a sudden, will sift out the truth much better

than a formal set of interrogatories previously penned and settled; and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other kind of trial. Nor is the presence of the judge during the examination a matter of small importance; for, besides the respect and awe with which his presence will naturally inspire the witness, *he is able by use and experience* to keep the evidence from wandering from the point in issue. In short, by this method of examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behavior and inclinations of the witness; in which points all persons must appear alike when their depositions are reduced to writing and read to the judge in the absence of those who made them; *and yet as much may be frequently collected from the manner in which the evidence is delivered as from the manner of it.*" The new Federal equity rules have set a precedent by which the States will undoubtedly profit at the instance of an alert bar.

Casuistry cannot disguise nor ingenuity palliate the waste of the assets of litigants. It lowers the morale of lawyers and destroys the respect of laymen. It cannot be gainsaid that an important duty of the lawyer is seeing to



the preservation of private property through a practical, economical administration of assets that fall under the control of the courts. They should not become beneficiaries of the breach of that sacred trust. In this consideration there may be passed by allowances made to political and family dependents and followers, that scandalized Congress into the enactment of an impotent statute quoted in another chapter, the ends of which may be defeated by indirection. The abuse will entirely disappear only with the retirement from the bench of the offenders the statute was intended to reach, but until that end is achieved it must be lessened by the influence of a wholesome public sentiment inspired by popular education. The administrative business of the courts can be conducted by the same sane and economical rules as the business of the counting-room and thereby meet the expectation of laymen. As has been pointed out, District Judge Rose, of Baltimore, voluntarily took a long step forward in requiring a verified bill of particulars, certified by three disinterested lawyers. But publicity would also help. Every court allowance could with material advantage be conspicuously published in a daily paper of the largest local circulation, setting forth the name of the recipient, the

service for which it was granted and the names of the three lawyers approving it.

This brings to mind a conspicuous example. One or more standing masters, as the business may require, nominated by the judge upon the recommendation of the local bar and compensated with a reasonable salary, would prove an economy and remove a political temptation. The yearly salary of a Federal district judge is \$6,000. It is interesting to observe that in one of these courts within a short period a fee of \$3,000 and one of \$3,500, respectively, were allowed. Other fees as high as \$10,000 have been allowed. No attempt is made to enumerate, but only to point out an instance with the object of inspiring reflection, because these sums were paid out of the assets of helpless and highly dissatisfied litigants and considered by them as an involuntary price for seeking justice in the courts. This is work for the proposed high judicial commission, which will find means for reimbursing the public treasury for fixed salaries to standing masters by a suitable assessment upon appropriate subjects.

Why may not the receiver of the court conduct a judicial sale as well as a half-dozen generously compensated special commissioners? There is no instrumentality for the dissipation of assets more patent and more popu-

larly criticized, and it should not be dignified by the classification of incompetent administration. The bankruptcy courts allow no such extravagance. Now why should an auctioneer be paid a greater sum for auctioning a trunk line than for offering a farm? The labor is not more burdensome. Manifestly his responsibility is often greater in the latter case than in the former, for sales of railroads are almost always purely formal, for purposes of reorganization. The thought is not to be seriously entertained that either agency ever beneficially influenced a bid in an amount justifying more than ordinary compensation. The psychology of the custom has been gracefully and suitably discussed in the facile humor of that erudite and widely experienced lawyer, Col. William A. Henderson, of Tennessee and Washington, under the title, "Honorariums." Cervantes indelibly impressed upon civilization that ridicule is not an unsuitable remedy to put against impractical customs.

There are three elements to be considered in official court reporting, viz.: qualification, selection, compensation and official status. Of these things the organized lawyers do not seem to have expressed an opinion. The reporters, though militantly agitating the subject, have not themselves formulated a pro-

gram. The present lively agitation promises the promotion of a propaganda that ought to be impressed by the well-matured views of the bar, which the reporters must eventually satisfy by whomsoever or however engaged. It will prove helpful to the bar to possess an expression of views from one of the active members of the National Shorthand Reporters' Association: "A competent shorthand reporter," said Mr. William L. James, editor of "The Shorthand Writer," "must have a vocabulary of legal terms at least equal to that of the average lawyer, and probably equal to that of the lawyer far above the average, because he must be able to understandingly take testimony, arguments and the like, and he cannot understandingly take in shorthand at a high rate of speed that which he could not understandingly write in long hand if he were not a stenographer." That is logical argument and would indicate the necessity for a test of qualification as a condition precedent to employment the corollary to which would appear to be a standard examination, if not civil service, which latter Mr. James also advocates. But this innovation must await a consensus of competent opinion, for many elements enter into its warp and woof. The observation is also made that where "appointments are entirely in the hands of the judge, it

very frequently occurs that personal friendship, relationship and politics play a more important part in the selection of officials than ability," and "that much of the Federal reporting is given out under the same influences." If we agree with his measure of competency, and Mr. James does not appear to have set much too high a standard, his other suggestions are well worthy of thoughtful consideration as *criteria* for testing future legislative programs. Complaint has also been made that "the Federal court reporter performs as much labor as secretary to the judge, with reference to his private and political affairs as in court duties." There will be no sympathy lost upon the reporter who lacks in reasonable consideration for and accommodation to the judge, particularly in the light of the latter's small compensation, but the psychology of the situation will quickly make necessary a *reporter status* as well distinguished as that of the clerk. His duties are not of less importance. The present system is not satisfactory. Able and experienced lawyers have recommended that court reporters be put upon a salaried basis; that a transcript of the evidence shall become a part of the papers of every case, and that the cost of carbons and copies, fixed at a very reasonable charge, shall be covered into the public treasury.

Is suitable attention being paid to the personnel of juries? "After all," said Blackstone [Bk. 3, p. 381], "it must be owned that the best and most effectual method to preserve and extend the trial by jury practice would be by endeavoring to remove all the defects as well as to improve the advantages incident to this mode of inquiry." "The administration of justice," said he, "should not only be chaste, but should not even be suspected" [Blk., Bk. 3, p. 383]. "The trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law." "Rome, Sparta and Carthage, at the time when their liberties were lost, were strangers to the trial by jury." "Therefore, a competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth and the surest guardians of public justice." "This, therefore, preserves in the hands of the people that share which they ought to have in the administration of public justice and prevents the encroachments of the more powerful and wealthy citizens" [Blk., Bk. 2, p. 379]. In Federal civil cases a citizen is prohibited from serving on petit juries oftener than once a year, and there is provided a non-partisan manner of selecting the panel, which lies between the clerk and some citizen for a differ-

ent political party *selected by him*. How many local bar associations have committees to observe the performance of this important law? Have the States suitable statutory provision as to this matter? It is the large number of exempt persons that inspires the dislike in others and increases the burden upon them. A public service would be performed in repealing the Federal statute permitting the marshal to call bystanders to the jury box. It provides an opportunity for the "professional juror" and lowers the dignity of one of the most sacred obligations of citizenship in a democracy.

The indemnity bond, for reasons both of convenience and necessity, has become an important element in the administration of justice. The economic feature is powerfully reinforced by sentiment in the light of the sacred duty of rendering humanly secure the assets of infants and others similarly unprotected whose property comes into the custody of the courts and trustees. While suitable statutory conditions reasonably prevent corporate insolvency, there is no assurance whatever against *individual official dishonesty*. This is an element of potential danger. Inasmuch as simple ethics should be a sufficient preventive of advantage being taken of the misfortune of the assured for purposes either of

private or corporate gain, there should be prohibitory statutes carrying harsh punishment for their breach. The sacred cloth has at times furnished habiliments for a wolf. A surety company, like a watchman, is a mere consumer until an attempted assault is made upon the employer. Three courses then are presented, viz.: (1) to protect bravely, unselfishly and honestly the helpless employer; (2) to run away and leave him to his fate, or (3) to enter into partnership with the trespasser in robbing the employer. The second course is cowardly, but the latter reflects a much lower order of human degradation. It is traitorism. That is its only characterization of the surety official who would gain profit for himself or his company out of the misfortune of the assured.

But let us turn from these troubling thoughts to the beautiful vision of Dean Lile, of the University of Virginia, "when law shall be a science and justice a certain measure." What higher ideal could be held up to the student and the lawyer, alike, than the belief that the judicial department of our government can be modernized, perfected and operated through the co-operation and co-ordination of the bench and bar so as to command the loving and dutiful respect of every law-abiding citizen?



## CHAPTER XIV.

## SOME PROCEDURAL STATISTICS.

Believing that they will serve a useful educational purpose and be a convenient source of reference, there will now be inserted some highly illuminating statistics recently compiled by Mr. Clarke B. Whittier, of Leland Stanford, Jr., University (31 *Harvard Law Rev.* 508), with his comments thereon, and by Mr. Frank B. Smith for the American Bar Association. Mr. Whittier's compilation embraces a period prior to the Hilary Rules, which synchronizes with Mr. Stephen's first book and his first public effort to substitute "court-made rules" for common law pleading, discussed in another chapter.

A study of the figures evidencing the unsatisfactory result of the operation of the Hilary Rules should prove a warning to the American Congress and the State Legislatures that a "half-legislative," "half court-made rule" policy affords no better chance of success than the rigid common law, or code pleading. The highly satisfactory outcome of all court rule system under the Judicature Act, adopted in 1873, is a living and convincing evidence of the merit of the all-court rule system. Mr.

Whittier's comments will also prove a most interesting and helpful aid to a comparative study of the several periods of juridical development under the Anglo-Saxon. It is regretted that we may not conveniently go further back into history. The table is as follows:

## THE PROPORTION OF DECISIONS ON PLEADINGS IN APPELLATE COURTS

JURISDICTION		Volumes examined	Date	Total cases examined	Rever- sals	Affirm- ances	Total pleading discus- sions
English common law pleading	H. L.	1 Dow & Clark	1827-30	82	0	1 in 11	1 in 11
	Ex. Ch.	1 & 2 Cr. & J. (Ex. Ch. cases, only)	1830-32	13	1 in 6	1 in 4	1 in 3
	Ex. Ch. & Exch.	1 C. & M.	1833	171	1 in 34	1 in 6	1 in 5
	K. B.	1 Nev. & M.	1832-33	139	1 in 189	1 in 8	1 in 7
	Total			355	1 in 44	1 in 7	1 in 6
English Hilary Rules pleading	Ex. Ch. & Exch.	16 M. & W.	1846-47	134	1 in 33	1 in 3	1 in 3
English Judicature Acts plead- ing	H. L.	A. C. 1906-9 (1907) 2 Ch. (part)	1906-09	230	0	0	0
	Divisional courts & Court of Appeal	(1908) 1 & 2 Ch. (1909) 1 & 2 Ch. (1907) 2 K. B. (part)	1907-09	325	1 in 162	1 in 46	1 in 36
		(1908) 1 & 2 K. B. (1909) 1 & 2 K. B.					
United States Sup. Ct.		221-24	1910-11	234	1 in 13	1 in 6	1 in 4
California		152-56	1907-09	435	1 in 15		
Connecticut		81	1908-09	208	1 in 21	1 in 5	1 in 4
		90	1915-16				
Illinois	Sup. Ct.	240-43	1909-10	233	1 in 15	1 in 5	1 in 4
	Sup. Ct.	249-62	1910-11	275	1 in 14	1 in 5	1 in 4
	App. Ct.	145-48	1908-09	434	1 in 19	1 in 8	1 in 5
	Appeals from the Municipal Court of Chicago	145-48	1908-09				
		161	1911	135	1 in 135	1 in 23	1 in 19
Iowa		139-42	1908-09	425	1 in 15		
Kansas		77-80	1908-09	685	1 in 19		
Massachusetts		204	1910				
		206-09	1910-11	550	1 in 92	1 in 11	1 in 10
Michigan		160	1910	110	1 in 87	1 in 14	1 in 10
		189	1916	101	0	1 in 20	1 in 20
Missouri		233-26	1910-11	132	1 in 44	1 in 4	1 in 4
New York		197	1909-10				
		199-202	1910-11	267	1 in 18	1 in 18	1 in 7
Ohio		77-80	1907-09	122	1 in 9		
Pennsylvania		256	1817	124	1 in 21	1 in 8	1 in 3
Tennessee		121	1902	26	1 in 26	1 in 5	1 in 4
Virginia		111-12	1910-11	232	1 in 20	1 in 7	1 in 5
Wisconsin		100-01	1898-99	185	1 in 15	1 in 5	1 in 4
		145-46	1911	173	1 in 43	1 in 7	1 in 6

Mr. Whittier commented as follows (31 Harvard L. Rev. 508) :

"We may notice first the remarkable figures from England. Under the common law system the matter was bad enough with a pleading question decided *in every sixth case*. But under the Hilary Rules it was worse. Every fourth case decided a question on the pleadings. Pleading ran riot. No wonder that the English bench and bar were ready for reform. And what a successful reform the Judicature Acts were! *In only one case in seventy-six can a pleading point be found. Reversals on questions of pleading drop from one in forty-four under the common law, and one in thirty-three under the Hilary Rules, to one in six hundred and five—one reversal in all the cases under the Judicature Acts which were examined.* \* \* \*

"If we turn now to the figures from American jurisdictions, we ought to be confounded by them. In almost every instance the showing is worse than under any one of the three English systems. In a number of reversals on the pleadings we unhappily outdistance England entirely, the average for all the jurisdictions examined being one reversal in every twenty cases. If we leave out Michigan \* \* \* the average is one reversal on pleadings for every seventeen cases. In affirmances on pleading points the average is one in seven cases, or the same as under the English common law. If again we exclude Michigan, the average is one in every six cases. \* \* \*

“Nor does it seem to make the least difference whether a State is a common law or a code State. In the matter of reversals the common law States average one in twenty-one, while the code States average one in twenty. In affirmances the common law States average one in six, the code States one in seven. Code pleading has not reduced the number of cases which are decided on pleadings.”

#### THE ALL-AMERICAN REPORT.

The all-American tabulation, prepared by Mr. Frank C. Smith, covering the General Digest for the months of January, February and March, 1910, is as follows:

States.	Total Cases.	Total Points.	Points on Sub.Law.	Points on Prac.	Per Ct. of Prac. Points.	Per Ct. of Inc.
Alabama .....	84	563	243	320	56.8	....
Arizona .....	..	...	...	...	....	....
Arkansas .....	165	665	283	382	57.4	16.4
California .....	173	961	432	529	55.0	7.0
Colorado .....	57	220	102	118	53.6	14.6
Connecticut .....	51	342	148	194	56.7	12.7
Delaware .....	24	118	42	76	64.4	....
Florida (C. L.).....	63	261	104	157	60.1	4.0
Georgia .....	218	627	265	362	57.7	....
Idaho .....	35	191	107	84	44.0	....
Illinois (C. L.).....	196	908	388	520	57.2	10.2
Indiana .....	135	783	324	459	58.5	....
Iowa .....	167	875	413	462	52.8	3.8
Kansas .....	125	332	169	163	49.0	1.0
Kentucky .....	229	830	467	363	43.7	8.7
Louisiana .....	133	296	161	135	45.6	11.6
Maine .....	32	203	108	95	46.8	8.8
Maryland (C. L.)...	8	77	34	43	55.8	21.8
Massachusetts .....	103	492	242	250	50.8	11.8
Michigan (C. L.)....	153	520	249	271	52.1	3.1
Minnesota .....	115	332	149	183	55.1	2.1
Mississippi .....	56	97	45	52	53.6	10.6
Missouri .....	269	1649	745	904	54.8	1.8
Montana .....	36	224	101	123	54.9	3.9
Nebraska .....	108	260	122	138	53.0	....
Nevada .....	17	40	17	23	57.5	25.5
New Hampshire.....	30	107	46	61	57.0	30.0
New Jersey.....	154	402	211	191	47.5	14.5
New Mexico.....	9	44	22	20	45.4	....
New York.....	888	2835	1382	1453	51.2	8.2
North Carolina.....	94	346	181	165	47.6	....
North Dakota.....	34	157	75	82	52.2	6.2
Ohio .....	26	76	37	39	51.3	13.3
Oklahoma .....	150	289	127	162	56.0	20.0
Oregon .....	57	310	124	186	60.0	5.0
Pennsylvania .....	188	620	301	319	51.4	10.4
Rhode Island.....	24	84	38	46	54.7	25.7
South Carolina.....	40	183	80	103	56.2	....
South Dakota.....	88	304	100	204	67.0	8.0
Tennessee .....	25	116	63	53	45.7	7.7
Texas .....	438	1742	798	944	54.2	....
Utah .....	23	103	34	69	66.9	17.0
Vermont .....	38	222	102	120	54.0	7.0
Virginia (C. L.).....	58	244	107	137	56.1	4.1
Washington .....	185	777	374	403	51.8	....
West Virginia (C. L.)	72	342	166	176	51.4	5.4
Wisconsin .....	100	505	244	261	51.6	....
Wyoming .....	8	73	33	40	54.0	6.0
Federal courts.....	466	1241	622	619	49.8	1.8
Totals.....	5927	22988	10727	12259	53.32	5.07

It will appear from this table that in more than one-half of the reported American cases are involved procedural points. There is a substantial increase except in 11 States. In the Federal courts there were decided many points on procedure as on the merits, lacking three. It will be seen that "Federal Practice" produced just one-half efficiency. In other words, as has been contended in former chapters, in order to obtain a result approximately two dollars must be spent, two hours must be consumed and two pages of reports must be printed where only one of each should be necessary. The English statistics, when brought into contrast, very satisfactorily prove this disgraceful fact. For convenience, the letters "C. L." are used to indicate those States still holding to the old common law system modified by statutes.

#### THE ANNUAL OUTPUT OF ALL COURTS.

The number of cases decided by the Federal and State courts of the United States during the period of one year between April, 1917, and April, 1918, was found by the West Publishing Company, in accordance with the following table, to be the astonishing number of 30,390. Opinions were written in 32,815 of these cases and 6,575 were disposed of without opinions. The West Publishing Company

was unable to give separate figures for the Court of Appeals, the Appellate Division and the miscellaneous lower courts in California, Georgia, Missouri, Oklahoma, Alabama, Texas, Indiana, New Jersey and Delaware, as was done in the case of New York.

STATEMENT OF BUSINESS IN THE UNITED  
STATES CIRCUIT COURTS OF APPEALS FOR  
THE FISCAL YEAR 1917.

Circuits.	Number of cases pending close of June 30, 1916.			Number of cases docketed, fiscal year 1917.			Number of cases disposed, fiscal year 1917.			Number of cases pending close of June 30, 1917.			* See footnote.	† See footnote.	‡ See footnote.
	Civil.	Criminal.	Total.	Civil.	Criminal.	Total.	Civil.	Criminal.	Total.	Civil.	Criminal.	Total.			
First.....	57	2	59	82	1	83	71	2	73	68	1	69	27	5	39
Second....	98	4	102	283	13	296	284	14	298	97	3	100	7	13	34
Third.....	42	3	45	127	4	131	109	5	114	60	2	62	31	3	31.03
Fourth....	40	3	43	74	9	83	79	6	85	35	6	41	14	2	38.7
Fifth.....	84	7	91	146	14	160	157	10	167	73	11	84	5	8	31.2
Sixth.....	123	9	132	130	6	136	163	9	172	90	6	96	27	13	33
Seventh...	107	23	130	96	13	109	95	17	112	108	19	127	55	5	32
Eighth....	208	28	236	224	32	256	233	36	269	199	24	223	108	12	33
Ninth....	136	16	152	174	19	193	179	18	197	131	17	148	101	90	20
Totals..	895	95	990	1336	111	1447	1370	117	1487	861	89	950	375	70	32.44

\* Cases marked pending, argued, and awaiting decision.

† Cases marked disposed of, appealed to the Supreme Court of the U. S.

‡ Percentage of reversals to total number of cases heard and determined.

Atty-Gen'l Rep., 1917, p. 122.

### FORM OF THE BILL.

The short bill receiving the support of the American Bar Association was first introduced



in the House of Representatives by Hon. Henry D. Clayton, then Chairman of the Committee on the Judiciary. It was referred to his committee, which made a unanimous report in its favor on the 27th day of March, 1914. Hon. Edwin Y. Webb, the present Chairman of that Committee, is now the patron of the bill in the House of Representatives. It was introduced in the Senate by Senator Culberson, and afterwards, with a few alterations, by Senator Sutherland, of Utah. The bill is as follows:

#### A BILL

To authorize the Supreme Court to prescribe forms and rules and generally to regulate pleading, procedure and practice on the common law side of the Federal Courts.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Supreme Court shall have the power to prescribe, from time to time and in any manner, the forms and manner of service of writs and all other process; the mode and manner of framing and filing proceedings and pleadings; of giving notice and serving process of all kinds; of taking and obtaining evidence; drawing up, entering and enrolling orders, and generally to regulate and prescribe by rule the forms for the entire pleading, practice and procedure to be used in all actions, motions and proceedings at law of whatever nature by the district courts*

of the United States and the District of Columbia.

SEC. 2. That when and as the rules of court herein authorized shall be promulgated, all laws in conflict therewith shall be and become of no further force and effect.

TABLE OF CASES PUBLISHED IN ONE YEAR  
(April, 1917, to April, 1918).

	Cases.	Mems.		Cases.	Mems.
Alabama .....	888	182	New Hampshire...	74	1
Arizona .....	57	5	New Jersey .....	452	72
Arkansas .....	634	42	New Mexico .....	122	0
California .....	1087	35	N.Y. Court of App.	214	535
Colorado .....	198	21	App. Div.....	2190	3765
Connecticut .....	116	0	Miscell. Rep....	245	1
Delaware .....	79	0	North Carolina....	443	15
C. C. A.....	1098	123	North Dakota.....	182	3
Fed. D. C.....	764	1	Ohio .....	110	22
Florida .....	233	71	Oklahoma .....	778	63
Georgia .....	1636	149	Oregon .....	379	22
Idaho .....	153	6	Pennsylvania ....	476	11
Illinois .....	481	25	Rhode Island.....	109	14
Indiana .....	386	36	South Carolina....	266	6
Iowa .....	625	20	South Dakota.....	208	10
Kansas .....	497	10	Tennessee .....	165	0
Kentucky .....	756	6	Texas .....	1628	75
Louisiana .....	436	16	United States....	318	467
Maine .....	146	5	Utah .....	156	1
Maryland .....	145	6	Vermont .....	98	0
Massachusetts ...	502	1	Virginia .....	163	4
Michigan .....	566	8	Washington .....	648	39
Minnesota .....	453	30	West Virginia....	256	2
Mississippi .....	488	567	Wisconsin .....	215	9
Missouri .....	1092	50	Wyoming .....	31	0
Montana.....	117	16			
Nebraska .....	214	6	Totals.....	23,815	6575
Nevada .....	42	1			

## RECORD OF THE FEDERAL SUPREME COURT.

## APPELLATE DOCKET—OCTOBER TERM.

	Years										
	1906	1907	1908	1909	1910	1911	1912	1913	1914	1915	1916
Cases at close of previous term not disposed of . . . . .	305	343	421	478	586	540	671	604	535	524	522
Cases docketed at the term . . . . .	476	471	487	503	509	530	509	524	528	545	647
Totals . . . . .	781	814	908	981	1095	1170	1180	1128	1063	1069	1169
Cases disposed of at the term . . . . .	438	393	430	395	455	499	576	593	539	547	637
Cases remaining undisposed of . . . . .	343	421	478	586	640	671	604	535	524	522	532

## COMMENT OF ATTORNEY-GENERAL.

"There was an increase of 102 in the number of cases docketed on the appellate docket, and an increase of 90 in the number disposed of. The number of cases remaining undisposed of *was increased* from 522 to 532.

"A reference to the foregoing table shows a total of 1,069 cases on the appellate docket during the 1915 term. The number of cases pending was *increased* during the 1916 term to 1,169, showing an increase of 100 cases on the appellate docket.

"At the close of the October term, 1915, there remained undisposed of on the appellate docket 522 cases, and on the original docket 20 cases, making a total of 542. The number of cases docketed at the October term, 1916, was 658, of which 647 were on the appellate docket and 11 on the original docket. These, with the 542 cases remaining undisposed of, make the total number of cases pending at the last term 1,200, of which 1,169 were on the

appellate and 31 on the original docket. Of this number 645 were disposed of during the term, 637 of which were on the appellate docket and 8 on the original docket, leaving undisposed of at the close of the October term, 1916, 555 cases, 532 being on the appellate and 23 on the original docket.

"The number of cases actually considered by the court was 500, of which 247 were argued orally and 313 submitted on printed arguments. Of the 637 appellate cases disposed of, 186 were affirmed, 90 reversed, 78 dismissed, 72 were settled by the parties and dismissed; in 3 questions certified were answered; 204 were denials of petitions for writs of *certiorari* under the Act of March 3, 1891, and 4 were docketed and dismissed.

"The total number of cases on the appellate docket in which the United States was a party or had a substantial interest disposed of at the October term, 1916, was 146. The United States was appellant in 52 of these cases and appellee, etc., in 78; 4 were private cases; 2 were certification of questions; 8 were original cases, and in 2 briefs as *amicus curiae* were filed."

Atty-Gen'l Rep., 1917, pp. 93-4.













